

Ulrike Müßig

Montesquieu's mixed monarchy model and the indecisiveness of 19th century European Constitutionalism between monarchical and popular sovereignty

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ABSTRACT: This paper discusses the (mis)conception of Montesquieu's *De l'Esprit des Lois* as the origin of the concept of functional separation of powers and his academic patronship for the balance of the social political powers. Another important aspect is Montesquieu's reception within the pre-revolutionary *remonstrances* or *cabiers*, the Natural law program of the Encyclopédists and the Constitutionalism around 1776 and 1789. The compromise of the national sovereignty in the French 1791-September Constitution is the first hint for the indecisiveness of 19th century European Constitutionalism between monarchical and popular sovereignty.

KEYWORDS: Montesquieu - Mixed Monarchy - European Constitutionalism

1. Introduction

The doctrine of the separation of powers is at the centre of modern constitutionalism. Charles-Louis de Secondat, Baron de la Brède et de Montesquieu (1689-1755)¹ is generally cited as the progenitor of this doctrine allegedly² stated in his work *De l'Esprit des Lois ou du rapport que les lois doivent avoir avec la constitution de chaque gouvernement, les moeurs, le climat, la religion, le commerce etc à quoi l'auteur a ajouté des recherches nouvelles sur les lois romaines touchant les successions, sur les lois françoises et sur les lois féodales* (1748)³. It was first published anonymously

¹ The castle de la Brède near Bordeaux is Montesquieu's birthplace and the *Lettres Persanes* (1721), the *Considérations sur les Causes de la Grandeur des Romains et de leur Décadence* (1728) and *De l'Esprit des Lois* (1748) were created here. Having studied law in Bordeaux (1705-1708), Montesquieu became advisor, later *Président* of the *Parlement* in Bordeaux (1714-1726).

² Cf. Martin Drath, *Die Gewaltenteilung im heutigen Staatsrecht* (The separation of powers in today's Constitutional Law), in Bracher ed., *Faktoren der Machtbildung*, Berlin 1952, at 99.

³ The *Pléiade-Edition, Oeuvres complètes* tome II, Paris (Gallimard) 1994, cop. 1951, based on the posthumously published Edition (Barrillot et fils, 1757) and edited by Roger Caillois was used. In the following the general short title *De l'Esprit des Lois* will be used. As for citations: Roman numbers stand for the book, Arabic numbers for the chapter and in brackets the respective page (e.g. XI, 6 (398) cites the XI. book, 6. chapter, page 398 of the *Pléiade-Edition*).

in December 1748 in Geneva by Barrillot & Sons.⁴

Montesquieu's analysis of the Spirit of Laws (*De l'Esprit des Loix*) covers the entire span of relations included in man-made positive law: the relation to nature (Book II: nature of the constitution) and to forms of government (Books III-VIII: principles of government); the relation to defensive and aggressive strategies of war (Books IX, X); the relation to political liberty in public and private (Books XI, XII); to the tax system (Book XIII); to the climate (Books XIV-XVII); to terrain (Book XVIII); to customs and social behaviour (Books XIX-XXIII) and to religion (Books XXIV-XXV).⁵ In Book XI Montesquieu analyses the relation between positive law and political liberty in the sovereign realm. The English constitution aims for political liberty, as indicated in the original draft of the title to chapter 6 of Book XI: "*Des principes de la liberté politique, comment on les trouve dans la constitution d'Angleterre.*"⁶

For Montesquieu, political liberty is to be found within balanced governments,⁷ referring not to the number of rulers, but the form of government. The contrast between balanced monarchy-despotism⁸ and balanced republic-despotism⁹ inspired Montesquieu's classification of the republican, the monarchical and the despotic forms of government, as opposed to Aristotle's categories of monarchy, aristocracy and democracy, differing according to the number of rulers.¹⁰ The legislative power is based in XI, 6 on the democratic rule of all (*les représentants, les députés*) with aristocratic participation (*corps des nobles*), the executive power is based on the monocratic rule of one and the judicial power on the aristocratic rule of few. Thus in each one of the three main powers a different governmental principle rules: the democratic principle in the Legislature, the monocratic principle in the Executive and the aristocratic principle in the Judiciary. The Aristotelian archetypes of monarchy, aristocracy, democracy in the antique classification are shared amongst the three types of governmental powers. The mixture of a democratic Legislature, a monocratic Executive and an aristocratic Judiciary characterizes

⁴ The first German translation was done in 1753 by Abraham Gotthelf Kästner: Abraham. G. Kästner, *Des Herrn von Montesquieu Werk von den Gesetzen, Aus dem Französischen übersetzt* (Montesquieu's work on the spirit of the laws, translated from the French), Frankfurt/Leipzig 1753.

⁵ The overview of the fields of application of the different types of laws (Book XXVI), the historical analysis of Roman and Frankish laws (Books XXVII-XXVIII), the reminder to the model legislator (Book XXIX) and the discussion on the historical genesis of the French monarchy (Books XXX, XXXI) will not be discussed in this context.

⁶ Montesquieu, note 1, *Dossiers de l'Esprit des Loix*, XI, 6 (1036).

⁷ *Ibid.*, XI, 4 (395).

⁸ *Ibid.*, II, 4 (247): "*Le pouvoir intermédiaire subordonné le plus naturel est celui de la noblesse. Elle entre en quelque façon dans l'essence de la monarchie, dont la maxime fondamentale est: point de monarche, point de noblesse; point de noblesse, point de monarche. Mais on a un despote.*" For him, an enlightened despot is just as good as a monarch, whilst an unenlightened monarch leads to a despotic rule, Book III, 10, § 8. Cf also Meyer Levin, Lawrence, *The political doctrine of Montesquieu's Esprit de Loix: Its classical background*, New York 1936, p. 62.

⁹ *Ibid.*, II, 3 (245): "*Une autorité exorbitante ... dans une république, forme une monarchie, ou plus qu'une monarchie*" (namely despotism).

¹⁰ Aristotle *The Politics* 3 7-8, 1279a 22f. In distinguishing republic, monarchy and despotism Montesquieu combines the two Aristotelian forms of government aristocracy and democracy in his republic (Book 2 ch 1 at 239), while he divides Aristotelian monarchy into monarchy and despotism. The Penguin Classics ed of Aristotle's *Politics* (1981) translated by Sinclair, revised by Saunders has been used. Cf. also Thomas Pangle, *Montesquieu's Philosophy of Liberalism, A Commentary on the Spirit of the Laws*, Chicago/London 1973, p. 50 et seq.

Montesquieu's ideal political constitution of a balanced or moderate monarchy (*gouvernement modéré*), as being a monarchy containing both democratic and aristocratic elements (*monarchie mêlée*)¹¹. As Montesquieu's main interest lies with balanced monarchy,¹² it will also be at the core of the following reflections.

2. The mixed monarchy model

In Montesquieu's real or imaginary English monarchy, as described in XI, 6, legislative power (*puissance législative*) is vested in Parliament, the executive power (*puissance exécutive*) in the Monarch,¹³ while the judicial powers (*puissance de juger*) are not held by any particular and separate political body and are only occasionally exercised by the Upper House of Parliament.¹⁴ This differentiation of the three functions of political power (*puissance législative; puissance exécutive; puissance de juger*) does not separate governmental authority but keeps the unity of sovereign power. This follows from the fact that the limitation of monarchical power is as natural to the feudal political theories of the Middle Ages as its indivisibility.¹⁵

2.1. Distinction of Montesquieu from Locke

From Montesquieu's citing of Locke, one should not infer an intention to adopt Locke's separation of legislative and executive powers¹⁶. The reference to chapter 12 of Locke's "The Second Treatise of Government", should also not induce an overestimation of the reception of Locke in Montesquieu's main work.¹⁷ Montesquieu's ideal of a distribution of powers and Locke's call for a separation of powers¹⁸ are distinct. Montesquieu's distribution of powers as characterized in XI, 6 contains neither the superiority of the Legislative over the Executive¹⁹ nor the deriving of sovereign power from the Social Contract²⁰.

¹¹ Montesquieu, note 1, 238*, 1049. As Rahe suggests, Montesquieu attributed the fact that European monarchs (compared to Oriental Rulers) exercised a lot of self-restraint to their lack in judicial power, Rahe, Paul A., *Montesquieu and the Logic of Liberty*, Yale 2009, p. 66.

¹² Montesquieu, note 1, II, 4 (247); Panajotis Kondylis, *Montesquieu und der Geist der Gesetze* (Montesquieu and the Spirit of the Laws), Berlin 1996, at 23 seq.

¹³ In regard to the question of distribution of powers in the balanced constitution, rights to veto can be left out.

¹⁴ Namely in lawsuits in which one party belonged to the aristocracy and in cases of issuing a bill of attainder. See Book XI, 6 (404).

¹⁵ Kern, *Gottesgnadentum und Widerstandsrecht im frühen Mittelalter, Zur Entwicklungsgeschichte der Monarchie* (Divine Right and the right to resist in the Early Middle Ages. On the genesis of monarchy) (1954); McIlwain, *Constitutionalism Ancient and Modern* (1961).

¹⁶ An in-depth discussion on Locke's influence on Montesquieu can be found in Kimbrough, Mary Alice, *English Influences on the Thought of Montesquieu: A Re-Evaluation*, Illinois 1966.

¹⁷ Louis Desgraves, *Montesquieu*, Frankfurt 1992, at 301 seq.

¹⁸ John Locke, *The second treatise of government: an essay concerning the True Original, Extent, and End of Civil Government*, ed. by Peter Laslett, Cambridge University Press 1963, chap. 12 (*Of the Legislative, Executive, and Federative Power of the Commonwealth*), § 143 (at 382 seq.).

¹⁹ *Ibid.*, chap. 12, § 150 (at 385 seq.).

²⁰ *Ibid.*, chap. 8, § 95 (at 348 seq.).

The distinction between the terms “mixed constitution” (unity of governmental authority) and “separation of powers” (separation of governmental authority) is revealed only by a thorough linguistic examination of how balance of power is described. Analysing Montesquieu’s terminology in XI, 6, one finds a predominance of the verbs “arrêter”, “empêcher”, “enchaîner”, “tempérer”, “lier”, “dépendre” and “modérer”, “droit d’arrêter,”²¹ “faculté d’arrêter,”²² “faculté d’empêcher,”²³ “l’une enchaînera l’autre par sa faculté mutuelle d’empêcher”²⁴, “besoin d’une puissance réglante pour les tempérer”²⁵ “Toutes les deux seront liées par la puissance exécutive”²⁶, “la puissance exécutive ne dépendra plus d’elle”²⁷ and “gouvernement est modéré”.²⁸ The verb “borner” of chapter 11 of the *Considérations sur les Causes de la Grandeur des Romains et de leur Décadence* should also be mentioned.²⁹ Montesquieu praises the prudent distribution of official powers in Rome:

“Les lois de Rome avoient sagement divisé la puissance publique en un grand nombre de magistratures, qui se soutenoient, s’arrêtoient, et se tempéroient l’une l’autre: et, comme elles n’avoient toutes qu’un pouvoir borné.”³⁰

Only once in XI, 6 does Montesquieu use the verb “séparer”:

“Il n’y a point encore de liberté si la puissance de juger n’est pas séparée de la puissance législative et de l’exécutive.”³¹

The verbs referred to above, setting the tone of XI, 6, are synonyms for moderation and restriction of a uniform sovereign authority, consisting of the monarch, the aristocracy- and the people as equal representatives of the three principles of governmental form in a mixed constitution.

In Locke’s *The Second Treatise of Government*, however, the separation of powers with its far-reaching isolation of governmental functions and their assignment to independent governmental bodies is expressed by the frequent use of the adjectives “separated” and “distinct”.³² The call for separation of power is directed at achieving political equilibrium. Any “exorbitance”³³ disturbs the balance of power. In paragraph 107 of *The Second Treatise of Government* Locke articulates his call for separation of power as protest against the impairment of the equilibrium through the parliamentary absolutism of the Long

²¹ Ibid., XI, 6 at 401, 403.

²² Idem at 403.

²³ Idem at 401, 405.

²⁴ Idem at 405.

²⁵ Idem at 401.

²⁶ Idem at 405.

²⁷ Idem at 405.

²⁸ Idem at 397.

²⁹ Montesquieu (note 1) Ch 11 at 124f. A large number of magistrates supported (*se soutenir*), held back (*s’arrêter*) and tempered each other (*se tempérer*) and each magistrate only had restricted power (*pouvoir borné*).

³⁰ Montesquieu, *Considérations sur les causes de la grandeur des Romains et de leur décadence* (Desbordes (Paris) 1734, at 11.124 seq.

³¹ Montesquieu, note 1, XI, 6 (397).

³² Locke, *Second Treatise* Ch 12 (Of the Legislative, Executive, and Federative Power of the Commonwealth) pars 143, 145, 147, 148, 159 at 382 seq., 392.

³³ Idem Ch 8 (Of the Beginning of Political Societies) par 107 at 356.

Parliament and the Whigs: “*It was not at all strange that they should not much trouble themselves to think of methods of restraining any exorbitancies of those to whom they had given the authority over them.*”³⁴

The aim of reaching a balance of power is the basis of any call for a separation of power. The latter cannot imply an absolute opposition of separation of power and combination of power in the sense of mutual dependency for “balance” is based on a correlation of the separation of powers and the combination of powers in that the participating powers communicate with each other and exert a mutual influence.³⁵ Only in this way does the separation of power reach equilibrium of checks and balances.³⁶

2.2. The pre-eminence of the aristocracy in Montesquieu’s concept

Montesquieu’s mixed constitution compounds characteristics deriving from all three forms of government and principles of legitimation: the authority of a monocratic ruler, the superior knowledge of an aristocratic elite and the sense of solidarity, common bond and *esprit de corps* of a democratic community. In a mixed constitution, sovereign power is vested in the monarch, the aristocracy and the people as equal representatives of the three constitutional principles which differ but stand for undivided and uniform sovereign power. In contrast, separation of powers signifies the considerable isolation of governmental functions and their allocation to separate governmental bodies. Due to the indivisibility of sovereign power in a mixed constitution, the question of the distribution of power is not a question of the limitation of sovereign power but a question of social balance in the relationship of Crown, nobility and citizens. Those powers are distributed according to social rank.³⁷ This shows that Montesquieu’s ideal of a distribution of powers in a mixed constitution is rooted in social and legal inequalities. According to Montesquieu, the privileges of the nobility guarantee political liberty. This suggests that Montesquieu’s aristocratic conviction is contrary to the concept of the sovereignty of the people, which implies equality. Furthermore, it is impossible that Montesquieu should have studied the concept of sovereignty of the people – which then in 1789 becomes a synonym for political liberty – on the basis of the constitutional reality in England. In its conflict with the Stuarts from 1642 onwards, Parliament never claimed to possess the authority to overrule the royal veto in the law-making process and thus to introduce some sort of sovereignty of the people (and separation of power) that would equal the notion of Rousseau’s “*volonté générale*”. Parliament rather asserted – as the highest common law court – its ultimate authority to interpret the “*fundamental laws*”, of which Parliament’s

³⁴ Idem Ch 8 (Of the Beginning of Political Societies) par 107 at 356.

³⁵ Cited in Bolingbroke *Remarks on the History of England (1730-1731)* Letter 7 at 653 n 47: “*The power which the several parts of our government have of controlling and checking one another, may be called a dependency on one another ... but this mutual dependency cannot be opposed to the independency pleaded for. On the contrary, this mutual dependency cannot subsist without such an independency. The independency consists in this, that the resolutions of each part ... be taken independently.*” Cf also Blackstone *Commentaries on the Laws of England* (repr 1979) Book 1 Ch 7 at 234: “*... the whole is prevented from separation, and artificially connected together by the mixed nature of the crown which is a part of the legislative, and the sole executive magistrate.*”

³⁶ Cf, eg, Bolingbroke, note 35, Letter 1 at 300.

³⁷ Jean-Jacques Granpré Molière, *La théorie de la constitution anglaise chez Montesquieu*, Presse universitaire de Leyde, 1972, at 331 seq.; Georges Vlachos, *La Politique de Montesquieu. Notion et méthode* (Éditions Montchrestien Paris 1974, at 77 seq., here 83.

interpretation of its right to self-defence is a good example.³⁸

In accordance with the aristocracy's social pre-eminence in Montesquieu's concept, his ideal mixed constitution focuses on balancing Crown and nobility.³⁹ The function assigned to the aristocracy as a balancing power cannot at first glance be detected in the English mixed constitution. This is due first to the fact that an intermediary position of the nobility had been abolished and second, to the existence of a strong democratic element: "*Les Anglois, pour favoriser la liberté, ont ôté toutes les puissances intermédiaires qui formoient leur monarchie*"⁴⁰. This becomes even more apparent in Montesquieu's description of his idealised French monarchy (II, 4), in which the existence of a nobility positioned as intermediary, is a fundamental principle. The balance between the French Crown and the nobility as described by Montesquieu is more obvious than his description of a balance between English Crown and nobility and shows more clearly the unity of governmental authority in the French Monarchy: uniform governmental authority is transmitted by those intermediary authorities.⁴¹

According to Montesquieu, those intermediary ranks (*pouvoirs intermédiaires*⁴², *rangs intermédiaires*⁴³) are an essential characteristic of a monarchical government conforming to the fundamental laws, namely of the moderation of governmental power. „*Les pouvoirs intermédiaires, subordonnés et dépendants, constituent la nature du gouvernement monarchique, c'est-à-dire de celui où un seul gouverne par des lois fondamentales.*"⁴⁴ This is how Montesquieu commences Chapter 4 of Book II of *De l'Esprit des Lois* (Chapter title: *Des lois dans leur rapport avec la nature du gouvernement monarchique*). These fundamental laws require channels of transmission, through which flows governmental authority,⁴⁵ in order to protect the subject from the momentarily prevailing will of the ruler as expressed in the Prince's Council⁴⁶. This is so because if there is only the momentary and arbitrary will of a single person in a state, then nothing is definite and, consequently, there are no fundamental laws.⁴⁷ The nobility⁴⁸ is the natural intermediary check of monarchical omnipotence: "*Le*

³⁸ Ulrike Müßig, *Constitutional conflicts in seventeenth-century England*, Tijdschrift voor Rechtsgeschiedenis, 76 (2008), 27-47.

³⁹ Cf. also Elie Carcassonne, *Montesquieu et le Problème de la constitution française au XVIIIe siècle*, Slatkine Reprints, Geneva 1970, at 80 seq. Critically Walter Struck, *Montesquieu als Politiker. Eine Erläuterung zu den Büchern II-VII und XI-XII des Geistes der Gesetze* (Montesquieu as politician. A commentary on the Books II-VII and XI-XII of the Spirit of the Laws), Berlin 1933, at 114 seq.

⁴⁰ Montesquieu, note 1, II, 4 (248). The House of Lords as second parliamentary chamber represents the aristocratic principle.

⁴¹ Ibid., II, 4 (247): "*Ces lois fondamentales supposent nécessairement des canaux moyens par où coule la puissance*".

⁴² Ibid., II, 4 (247).

⁴³ Ibid., II, 4 (249).

⁴⁴ Ibid., II, 4 (247). The clause "*subordonnés et dépendants*" did not appear in the original manuscript, cf. Shackelton, Robert, *Montesquieu, A Critical Biography*, Oxford 1961, p. 279.

⁴⁵ Ibid., II, 4 (247) : "*Ces lois fondamentales supposent nécessairement des canaux moyens par où coule la puissance*".

⁴⁶ In the same way the *Essay historique concernant les droits et prérogatives de la Cour des Pairs de France qui est le Parlement seant à Paris* describes the Prince's Council, chap X (Anonymus, *Essay historique concernant les droits et prérogatives de la Cour des Pairs de France qui est le Parlement seant à Paris, chap V. Tiré des Registres du dit Parlement, des ordonnances et édits de nos Roys, des Remontrances a eux faites, des plus habiles jurisconsultes et historiens et d'autres monuments authentiques* (Bibliothèque National Paris, B.N. n.a.fr.n° 1503, fol 210^v).

⁴⁷ Montesquieu, note 1, II, 4 (247).

⁴⁸ As to the position of pre-eminence of the nobility in Montesquieu's concept of a monarchy cf critically Struck, *Montesquieu als Politiker. Eine Erläuterung zu den Büchern II-VII und XI-XII des Geistes der Gesetze*

*pouvoir intermédiaire subordonné le plus naturel est celui de la noblesse.*⁴⁹ With these « *pouvoirs intermédiaires* » Montesquieu means and describes the “*parlements*”.⁵⁰ This interpretation is based on the following thoughts: Montesquieu defines the aristocracy’s balancing function in II 4 as transmitting the monarchical will and procuring established law (*dépôt des lois*): “*Il ne suffit pas qu’il y ait, dans une monarchie, des rangs intermédiaires; il faut encore un dépôt des lois.*”⁵¹ This “*dépôt*” of laws can only be those political bodies that proclaim the laws, once they are made, and bring them to mind should they be forgotten: the *parlements*, especially the *parlement de Paris*.⁵² This interpretation is in accordance with the designation of the *parlement de Paris* as “*médiateur*” in the *Essay historique concernant les droits et prérogatives de la Cour des Pairs de France qui est le Parlement seant à Paris* (1721): “*Médiateur entre le monarque et le peuple, il constitue le premier corps de l’État.*”⁵³ As the convocation of the Estates General fully depends upon the Monarch’s will, the nobility cannot effectively succeed in balancing:

« les États généraux ont une autorité imposante, mais en fait peu d’efficacité: leur convocation dépend du roi, et une foule d’intrigues faussent élections et délibérations. C’est donc au Parlement que revient le dépôt de la liberté publique; c’est grâce à lui que la monarchie française se distingue de la tyrannie, et l’obéissance des sujets, de la soumission des esclaves. »⁵⁴

2.3. Balancing the social political powers: Crown, nobility and citizenry

The balancing or tempering of sovereign power by combining monarchical, aristocratic and democratic principles in the right measure will only be the guarantor of political liberty if a social balance between crown, nobility and *bourgeoisie* can be achieved:

« La liberté politique ne se trouve que dans les gouvernements modérés ... Mais elle n’est pas toujours dans les États modérés; elle n’y est que lorsqu’on n’abuse pas du pouvoir; mais c’est une expérience éternelle que tout homme qui a du pouvoir est porté à en abuser ... Pour qu’on ne puisse abuser du pouvoir, il faut que, par la disposition des choses, le pouvoir arrête le pouvoir. »⁵⁵

This is in Montesquieu’s own words in XI, 4 the necessity of a balance of power in a balanced (mixed) constitution. The concrete historical background of Montesquieu’s call for balance is the aristocratic opposition against the centralism of the French monarchy. Even Bolingbroke had formulated this balance of power in the mixed constitution: “*It is by this mixture of monarchical, aristocratical and democratical power, blended together in one system, and*

(Montesquieu as politician. A commentary on the Books II-VII and XI-XII of the Spirit of the Laws), 1933, 114f.

⁴⁹ Ibid., II, 4 (247).

⁵⁰ This also was the interpretation of his contemporaries. Cf. only Louis-Gabriel Du Buat-Nançay, *Éléments de la Politique, ou Recherche des vrais principes de l’Économie sociale*, Londres 1773, at liv. 6, chap. 19, t. 3, 169 f. Differentiating Iris Cox, *Montesquieu and the history of French laws*, Oxford 1983, p. 151 et seq.; Robert Shakleton, *Montesquieu. A Critical Biography*, Oxford 1961, p. 279 et seq.; Neal P. Todd, *Montesquieu and the Debate on the Origins of the French Monarchy*, PhD Phil Oxon, BL British Thesis 1988, p. 201 et seq.

⁵¹ Montesquieu, note 1, II, 4 (249).

⁵² Ibid., II, 4 (249).

⁵³ Anonymus, note 46, chap 6, fol 205^v.

⁵⁴ Ibid., chap 13, fol 215^r.

⁵⁵ XI, 4 at 395.

by these three estates, balancing one another, that our free constitution hath been preserved so long inviolate, or hath been brought back ... to its original principles.”⁵⁶

The image of a balance of power to maintain harmony had been in common usage from 1650 to 1750 in all areas of life.⁵⁷ Jean-Louis De Lolme (1740-1806) describes the balance of power in mathematical terms: “*Dans les côtés opposés d’une équitation, les qualités égales, positives ou négatives, se détruisent l’une l’autre.*”⁵⁸; and Montesquieu himself applies a musical and a mechanical metaphor in his *Considérations sur les causes de la grandeur des Romains et de leur décadence* (1734)⁵⁹, which lay the foundations for his main work.

Misconceiving Montesquieu’s distribution of powers as separation of powers may result from the fact that balance of powers is the common denominator of both Montesquieu’s idealised mixed monarchy (as in XI, 6 and II, 4)⁶⁰ and Locke’s call for a separation of powers⁶¹. This balance metaphor is evident in the usage of supporters of a mixed constitution as well as those who propound a separation of powers. The English Civil Wars of the 17th century provide a good example of the usage of the notion of balance across all political groups: According to the Diary of Sir Bulstrode Whitelocke for the parliament of 1626 “*the prerogative of the King and the libertye of the people must have a reciprocally relation and respect.*”⁶² Thomas Wentworth, Earl of Strafford, defines this vital balance for the state as “*just Symetry, which maketh a sweet harmony of the whole*”⁶³ This same understanding is expressed by Finch in his opening speech to the Long Parliament: “*Where was there a Common-wealth so free, and the ballance so equally held, as here...*”⁶⁴ Also the monarchist Hyde refers to the notion of balance: “*the constitution of the government so equally poised, that if the least branch of the prerogative was torn off, or parted with, the subject suffered by it, and that his right was impaired: and he was as much troubled when the crown exceeded its just limits, and thought its prerogative hurt by it.*”⁶⁵ And after the Restoration in 1660 the balance of powers is known to the academic society of the Middle Temple: “*For it so harmoniously intermixes the rights of Sovereignty with the liberty of the Subject, that the one balances the other, nay, the least jarr in the one, makes a loud discord in the other*”⁶⁶.

This omnipresence might also have influenced Montesquieu’s characterization and

⁵⁶ Bolingbroke, note 35, at 90.

⁵⁷ Cf. balance between landowners as metaphor for a constitutional balance of powers with James Harrington, “The Model of the Commonwealth Oceana” in Pocock ed., *The Commonwealth of Oceana and a System of Politics* (1656), Cambridge University Press 1992, at 100 et seq.

⁵⁸ Jean-Louis De Lolme, *Constitution de l’Angleterre* (1771): *Die Constitution Englands in ihrer genetischen Entwicklung*, translated by C. F. Liebetreu, Berlin 1848, at 25.

⁵⁹ Montesquieu, note 1, at 9.119.

⁶⁰ Walter Kuhfuss, *Mäßigung und Politik. Studien zur politischen Sprache und Theorie Montesquiens* (Moderation and Politics. Studies on the political language and theory of Montesquieu), München 1975, at 34 seq., here 168 seq.

⁶¹ Locke, note 32, at chap 8 (*Of the Beginning of Political Societies*), § 107 (356).

⁶² Cambridge University Library MS D.D. 12, fol 20r.

⁶³ John Rushworth, *Historical Collections* (D. Browne [etc.], 1721-22), at 8: 640.

⁶⁴ John Nalson, *An Impartial Collection of the Great Affairs of State from the Beginning of the Scotch Rebellion in the Year 1639 to the murder of King Charles I.* (Printed for S. Mearne [etc.], 1682-83), at 483.

⁶⁵ Edward Hyde, *The Life of Edward Earl of Clarendon, written by himself*, Oxford University Press 1857, at 1: 89.

⁶⁶ The Reader’s Speech of the Middle Temple at the Entrance into his Reading, February 29, 1663/1664 upon the Statute of Magna Charta, Chap 29, London 1664, 5.

description of the English constitution and thus added to the misunderstanding of the concept of distribution of powers in XI, 6. The call for balance of power with the doctrine of separation of powers as background cannot be identical with the call for balance of power based on the idea of the mixed constitution.

The following difference is insurmountable: The doctrine of separation of powers aims at an institutional balance of power between governmental bodies; the notion of balance inherent in the mixed constitution on the other hand (XI, 4: *le pouvoir arrête le pouvoir*⁶⁷) is directed towards a balance of the socio-political powers. Balance of powers as envisaged by the supporters of the mixed constitution does not refer to the institutional balance of governmental bodies, but describes the balance of the socio-political powers. The English philosopher William Paley (1743-1805) expressly states the social importance of balance of powers in the mixed constitution. Within a general “*balance of constitution/political equilibrium*” he distinguishes *balance of power* in regard to the different state powers and *balance of interest* in the sense of social balance. *Balance of power* requires the different state organs to be organized in such a way so as to prevent abuse of one organ by another. Social balance is based on the organization of the three Estates in Parliament in such a way, that attempts to usurp power of one Estate can be deterred by the other two.⁶⁸ It is in this sense that Montesquieu discusses the distribution of powers in Ancient Rome (XI, 14-18). The balance of powers in the mixed constitution does not call for an institutional control of the monarchical Executive through the Legislative, but rather an equilibrium within the governmental body constituted by the different social powers. Montesquieu illustrates in XI, 6 the balance between the three principles of form within the Legislature with the Executive’s right to veto (“*faculté d’empêcher*”), the two-chamber system (“*au corps des nobles et au corps qui sera choisi pour représenter le peuple*”) and the conservative aristocracy’s freedom to adopt the law in its favour (“*à modérer la loi en faveur de la loi même*”). This interpretation as social balance is the only possible explanation for Montesquieu’s view that the Executive had implicit restrictions – clearly opposing the common understanding of the Ancien Régime as a police state: “*Car l’exécution, ayant ses limites par sa nature, il est inutile de la borner.*”⁶⁹ The concrete historical background of Montesquieu’s call for balance is the aristocratic opposition against the centralism of the French monarchy.

The notion of balance is not new. According to a statement of Francis Bacon “*The King’s Sovereignty and the Liberty of Parliament...do not cross or destroy the one the other, but they strengthen and maintain the one the other.*”⁷⁰ In XI, 14-18 Montesquieu describes the equilibrium of the socio-political powers in the Roman constitution. Balance is possible wherever governmental authority is undivided and thus had also been discussed by the apologists of undivided monarchical authority.⁷¹ Montesquieu combines the ancient

⁶⁷ Montesquieu, note 1, XI, 4 (395).

⁶⁸ William Paley, *The Principles of Moral and Political Philosophy*, Printed for R. Faulder, 1785, at chap 2, 31. Cf. also Charles Eisenmann, *L’Esprit des Lois et la separation des pouvoirs*, in Carré de Malberg ed., *Melanges Raymond Carré de Malberg*, Paris (Sirey) 1933, at 163-93, here 189.

⁶⁹ Montesquieu, note 1, XI, 6 (403).

⁷⁰ Cited according to: James Spedding ed., *Letters and Life of Francis Bacon*, Longmans [etc.], London 1869, at 4: 177.

⁷¹ Cf. Francis Bacon: “*The King’s Sovereignty and the Liberty of Parliament do not cross or destroy the one the other, but they strengthen and maintain the one the other*” (cited from Spedding (ed) *Letters and Life of Bacon* Vol 4 (1869) at 177.

notion of balance with his model of a mixed constitution. Balance of power cannot therefore be regarded as invented by or resulting from the various calls for separation of powers.⁷²

Montesquieu's call for equilibrium of the socio-political powers, namely crown, nobility and *bourgeoisie* (representing the monarchical, aristocratic and democratic principles), aims at neither a republican nor a democratic governmental structure. He expressly and exclusively applies the doctrine of balance of the socio-political powers to the monarchy: "*De quelque côté que le monarque se tourne, il emporte et précipite la balance.*"⁷³ The greatest virtue and aspiration of the legislature should be the moderation of governmental power in a well-tempered mixed constitution (XXIX, 1). This striving then is superior to the criteria of the different types of constitutions and indeed characterises any non-despotic form of government. The affinity of Montesquieu's *De l'Esprit des Lois* to the nobility is evidence enough that Montesquieu has erroneously been regarded as the author of the modern constitutional principle of functional separation of powers. The aristocratic bias of Montesquieu's model of a mixed monarchical constitution marks the difference between Montesquieu's concept of distribution of powers and the modern constitutional principle of separation of powers, for which the doctrine of sovereignty of the people, implying their equality before the law, is an absolute prerequisite. The notion of a balance between the socio-political powers (crown, nobility and *bourgeoisie*) in a mixed constitution has to be clearly distinguished from a balance of powers in the sense of a concept of "checks and balances": While the concept of a mixed constitution is directed towards achieving an equilibrium between the socio-political powers, the concept of separation of powers aims at establishing the institutional balance of governmental bodies.

2.4. Montesquieu's progenitors

This is not the place to discuss the originality of Montesquieu's mixed constitution. I would however, draw the attention to the following progenitors: In *The Idea of a Patriot King* (1738) Henry Saint John Bolingbroke (1678-1751) praises the monarchical form of government for its potential to accommodate democratic and aristocratic elements, i.e. for the possibility of transmitting monarchical power via independent democratic or aristocratic intermediaries.⁷⁴ Anticipating *De l'Esprit des Lois* II, 4, Bolingbroke spoke out for a strong intermediary position of the nobility in a monarchy: "*The peers constitute a middle order, and are properly mediators between the other two [Crown and people].*"⁷⁵ This mix of monarchical power with democratic and aristocratic elements is also popular and widespread among Bolingbroke's contemporaries and fellow campaigners against the

⁷² McIlwain (n 15) 141f: "*Political balances have no institutional background whatever except in the imaginations of philosophers like Montesquieu. When in modern times representative assemblies took over the rights and duties of earlier kings, they assumed a power and a responsibility that had always been concentrated and undivided. There is no medieval doctrine of the separation of powers, though there is a very definite doctrine of limitation of powers.*"

⁷³ Ibid., III, 10 (261).

⁷⁴ Henry St John Bolingbroke, "The Idea of a Patriot King (1738)", in: *The Works of Lord Bolingbroke*, volume II, Carey and Hart, Philadelphia 1841, at 372 seq. For details regarding Montesquieu in England see John Curton Collins, *Voltaire, Montesquieu and Rousseau in England*, London 1908, p. 117 et seq.

⁷⁵ Henry St. John Bolingbroke, "A Dissertation upon Parties (1733-34)", in: *The Works of Lord Bolingbroke*, volume II, Carey and Hart, Philadelphia 1841), at 24. Bolingbroke's aristocratic *properly mediators* are comparable to Montesquieu's *pouvoirs intermédiaires* (Montesquieu, note 1, II, 4, 247).

Parliamentary absolutism of the Whigs under Robert Walpole. Paul de Rapin-Thoiras (1661-1725)⁷⁶ characterized the English constitution as a mixed constitution in which the powers of the Crown, the nobility and the people limit one another.⁷⁷ Jonathan Swift (1667-1745), Bolingbroke's secretary, speaks out in a pamphlet (1701) in favour of a balance of power between Crown, nobility and the people.⁷⁸

The French model of a mixed government can already be found in a French source of 1721: "*puisque la forme du gouvernement françois rassemble tout ce qui est de plus parfait dans la monarchique, l'Aristocratique, et la Democratique, sans renfermer aucun inconvénient.*"⁷⁹ The mixture of forms of government as expressed by Bernard La Roche-Flavin in his *Treize livres des Parlements de France* in 1621 is significant: "*Le Royaume et Monarchie de France est réglée et policée, et est composée et mixtionnée de trois sortes du gouvernements ensemble, sçavoir de la Monarchie, Aristocratie et Republique: à fin que l'un servist de frein et contre-poids à l'autre.*"⁸⁰

The theory of the mixed constitution is a genuine product of classical political theory.⁸¹ Based on Polybius⁸² and Cicero⁸³ and transmitted by the Stoics, the idea of the ideal mixed constitution influences Christian political theory in the Middle Ages (Thomas Aquinas) and later humanistic political and constitutional theory.⁸⁴ Montesquieu's *Considérations sur les causes de la grandeur des Romains et leur décadence* (1734) draw substantially on Polybius.⁸⁵

3. Montesquieu's reception

3.1. Reception of Montesquieu by the French parliamentary nobility

In Montesquieu's model of a French mixed constitution (II, 4) the *Parlements* – as *pouvoirs intermédiaires* and *dépôt des lois* – represent the balancing function of the aristocratic

⁷⁶ *Histoire d'Angleterre* (1723-1725), trans. David Durand, La Hague 1753.

⁷⁷ Cited in Henry St. John Bolingbroke, "Remarks on the History of England (1730-1731), Letter I", in: *The Works of Lord Bolingbroke*, volume I, Carey and Hart, Philadelphia 1841, at 298.

⁷⁸ Cited in Mary T. Blauvelt, *The development of Cabinet Government in England* (Macmillan, 1902), at 95.

⁷⁹ Anonymus, note 46, fol 202^r).

⁸⁰ Bernard de La Roche-Flavin, *Treize livres des Parlements de France*, Geneva 1621, at liv. 13, chap 17, §§ 11-12, 924.

⁸¹ Gerhard J. D. Aalders, *Die Theorie der gemischten Verfassung im Altertum* (The theory of mixed constitutions in ancient times), Amsterdam 1968, at 25 seq.; Kurt v. Fritz, *The Theory of the Mixed Constitution in the Antiquity*, Columbia University Press 1954, at 10 seq.; Edwin Graeber, *Die Lehre von der Mischverfassung bei Polybios* (The doctrine of mixed constitutions in Polybios), Bonn 1968, at 7-8; Michael Rostock, *Die antike Theorie der Organisation staatlicher Macht, Studien zur Geschichte der Gewaltenteilungslehre* (The ancient theory of the organisation of the state power), Meisenheim am Glan 1975, at 306 seq.

⁸² Polybius, *Histories*, 6.11.11; Bodin cites Polybius' conception of the Roman mixed constitution (Jean Bodin, *Les six Livres de la République*, 1.10 (Chez Jacques du Puys, 1583 ; facsimile print Scientia, 1961), at 213).

⁸³ Cicero, *De legibus* 3.14; Cicero, *De re publica* 1.69.

⁸⁴ Wilhelm Hasbach, "Gewaltentrennung, Gewaltenteilung und 'gemischte Staatsform'" (separation of powers and mixed constitutions), (1916) 13 *Vierteljahresschrift für Sozial- und Wirtschaftsgeschichte*, 562-607, here 582.

⁸⁵ Max Imboden, *Montesquieu und die Lehre der Gewaltentrennung* (Montesquieu and the doctrine of the separation of powers), Berlin 1959, at 17; Peter V. Conroy, *Montesquieu Revisited*, New York et al. 1992, p. 52 et seq.

principle. Montesquieu himself is a member of the *Parlement de Bordeaux* and accordingly a member of the parliamentary nobility (*noblesse de robe*)⁸⁶ - hence the ready and unsurprising acceptance of *De l'Esprit des Lois* among the parliamentary nobility as the work of a member of their own ranks.

Montesquieu's plea for the role of the *parlement* as an intermediary force and lawkeeper becomes the shining example in pro-nobility literature. Apart from Pierre Augustin Baron de Beaumarchais (1713-1788)⁸⁷, Victor Riqueti, Marquis de Mirabeau (1715-1789) and the Comte du Buat-Nançay (1705-1780) must be singled out. According to Mirabeau in *Mémoire concernant l'utilité des Etats provinciaux, relativement à l'autorité royale, aux Finances, au bonheur et à l'avantage des Peuples* (1750), the difference between monarchy and despotism lies in the maintenance of the aristocracy as the eternal upholders of fundamental law (*loi fondamentale*)⁸⁸. The praise of the aristocracy as an intermediary force is also the underlying theme in Mirabeau's *Doubts Concerning the Free Navigation of the Scheld* (1785) and in his work *Aux Bataves sur le Stathoudérat* (1788).⁸⁹ Mirabeau's main work *L'ami des Hommes* (1757) borrows almost verbatim from Montesquieu's *De l'Esprit des Lois*: „*Les pouvoirs intermédiaires, subordonnés et dépendants constituent la nature du gouvernement monarchique.*“⁹⁰ Although in *Les Origines, ou l'Ancien Gouvernement, de la France, de l'Allemagne, et de l'Italie* by Comte du Buat-Nançay, published in 1757, Montesquieu's influence cannot be plainly established,⁹¹ he discusses Montesquieu's aristocratic intermediary bodies (*“la doctrine lumineuse des corps intermédiaires”*⁹²) in the *Éléments de la Politique, ou Recherche des vrais principes de l'Économie sociale*, published in 1773. The main subject herein is the parliamentary judiciary (*corps intermédiaire dans l'ordre de la justice et des lois*)⁹³. Although he criticises the

⁸⁶ Having substituted the principle of election for the hereditary principle in the Ordonnance ou Établissements pour la réformation de la justice, Montils-les-Tours, April 1453 (cited in: Athanase/J. L. Jourdan/Décruy/François A. Isambert/Alphonse H. Taillandier eds., *Recueil général des anciennes lois françaises depuis l'an 420 jusqu'à la révolution de 1789*, Belin-Leprieur [etc], Paris 1827, at 9: 202 - 255) a certain parliamentary class (*gens du Parlement; noblesse de robe*) with extensive privileges, fixed career description, uniform way of life and close social interaction evolved.

⁸⁷ Pierre A. C. de Beaumarchais, *Réponse ingénue de Pierre Augustin Caron de Beaumarchais à la consultation injurieuse que le comte Joseph Alexandre Falcoz de la Blache a répandue dans Aix*, Paris 1778, 1^{re} partie, 6 (Factum, s.l.n.d., in: *Recueil de factums de la Bibliothèque Nationale*, in 4^o, F.m. 2079).

⁸⁸ Edme J. B. Rathery ed., *Mémoire concernant l'utilité des Etats provinciaux, relativement à l'autorité royale, aux Finances, au bonheur et à l'avantage des Peuples, Mémoires et journal inédit du marquis d'Argenson publiés...pour la société de l'Histoire de France* (Mme de J. Renouard, 1859-67), at 6 : 14.

⁸⁹ *Doubts Concerning the Free Navigation of the Scheld Claimed by the Emperor, and the Probable Causes and Consequences of that Claim, in which the Views of his Imperial Majesty, and of the Empress of Russia are Clearly Pointed out, and the Characters of Those Great Potentates are Exhibited in a New, and Interesting Light* (London 1785) Letter 4 (How the Navigation of the Scheld may be opened without any danger to Holland, or to Europe) 155f; *Aux Bataves sur le Stathoudérat*, Paris 1788, at 14.

⁹⁰ Victor R. Marquis de Mirabeau, *Réponse aux objections contre le Mémoire sur les États Provinciaux, Ami des Hommes, t III: Précis de l'organisation, ou Mémoire sur les États Provinciaux*, Avignon 1775, at 15.

⁹¹ Cf. Louis-Gabriel Du Buat-Nançay, *Les Origines, ou l'Ancien Gouvernement, de la France, de l'Allemagne, et de l'Italie, t.1*, La Haye, 1775, at Discours préliminaire, 39 seq. In this work the Comte du Buat-Nançay magnified the position of social predominance of the aristocracy and in doing so claims an exclusive position of the aristocracy in regard to state building. (Du Buat-Nançay, *Les Origines, ou l'Ancien Gouvernement, de la France, de l'Allemagne, et de l'Italie*, La Haye 1757 at 2 : liv 6, chap 7, 287; La Haye 1757, 4 : liv 12, chap 7, 157.

⁹² Du Buat-Nançay (n. 90), liv 6, chap 19, 166.

⁹³ Louis-Gabriel Du Buat-Nançay, *Éléments de la Politique, ou Recherche des vrais principes de l'Économie sociale*,

participation of the *parlement de Paris* in the law-making process, du Buat-Nançay praises the intermediary function of the *parlement* which is close enough to the people to hear it and close enough to the monarch to be heard, so that it can defend the nation's interest by remonstrating (*remontrances*) and lending its voice to the nation.⁹⁴ Du Buat-Nançay repeats Montesquieu's praise for *parlement's* authority as depository of the law: "*je le regarderai comme un des corps les plus utiles et les plus respectables qui puissent être formés pour le bonheur d'une nation.*"⁹⁵ The nobility's traditional primacy is described by du Buat-Nançay in Montesquieu's words⁹⁶ as a necessary precondition for the maintenance of equilibrium in the state. However, in *Les Maximes du gouvernement Monarchique, pour servir de suite aux Éléments de la Politique* (1778) the concept of sovereignty of the people⁹⁷ ousts the balancing function of the aristocratic principle: du Buat-Nançay rejects the aristocratic intermediary bodies as "*artifices dangereux*"⁹⁸ and disparages the *parlement* as "*un polype dont les racines ont pénétré toutes les parties de la société.*"⁹⁹

With his work *Abrégé de la République de Bodin* (1755) de Lavie (1699-1765) stands out from the applauding parliamentary circles. De Lavie develops Montesquieu's idea of balance and moderation of governmental power ("*tempérament des pouvoirs*"¹⁰⁰) in mixed constitutions.¹⁰¹ According to his theory in *Monarchie considérée comme une République mixte*,¹⁰² the various pure forms of government are – each individually – corrupted by lack of, excess of or mis-distribution of liberty; only a mixture of the different forms of government is able to concentrate the advantages and neutralise the disadvantages.¹⁰³ De Lavie's mixed monarchy is not based on a restriction of monarchical power by a rivalling power but on its prudent combination with subaltern powers (*corps*):

« Cette constitution participera de l'Aristocratie en ce qu'elle sera en quelque manière un gouvernement de corps distingués; elle tiendra du populaire par le nombre, et en ce que tout citoyen d'une condition honnête, pourra aspirer d'être membre de ces grands corps. »¹⁰⁴

De Lavie's *grands corps* correspond to Montesquieu's *pouvoirs intermédiaires*, meaning the *parlements*: « *L'autorité intermédiaire ne peut être que celle qui est chargée de maintenir l'ordre; l'ordre n'est que l'exécution des loix; c'est donc où réside le dépôt des loix et la jurisdiction que l'on doit trouver les pouvoirs intermédiaires.* »¹⁰⁵ Without sharing Montesquieu's aristocratic view,¹⁰⁶ de Lavie

Londres 1773, at liv 9, chap 6, t 5, 209.

⁹⁴ Du Buat-Nançay (n. 92), at liv 9, chap 5, 179; liv 9, chap 6, 216 f.

⁹⁵ Du Buat-Nançay (n. 92), at liv 9, chap 5, 181.

⁹⁶ Du Buat-Nançay (n. 92), at liv 7, chap 9, 412.

⁹⁷ Louis-Gabriel Du Buat-Nançay, *Les Maximes du gouvernement Monarchique, pour servir de suite aux Éléments de la Politique*, Londres, 1778, at liv 4, chap 4, 6, t 4, 78.

⁹⁸ Du Buat-Nançay (n. 96), at liv 4, chap 14, 442.

⁹⁹ Du Buat-Nançay (n. 96), at liv 4, chap 12, 377.

¹⁰⁰ Jean Ch. de Lavie, *Abrégé de la République de Bodin*, tome I, Londres 1755, at liv 2, chap 3, 73.

¹⁰¹ De Lavie (N. 99), at chap 12, 175.

¹⁰² De Lavie (N. 99), at t II, liv 12, chap 6, 657.

¹⁰³ De Lavie (N. 99), at t II, liv 6, chap 10, 11, 193.

¹⁰⁴ De Lavie (N. 99), at t II, liv 6, chap 12, 393 et seq.

¹⁰⁵ De Lavie (N. 99), at t II, liv 6, chap 12, 396.

¹⁰⁶ De Lavie (N. 99), at t II, liv 6, chap 12, 395. There is no room for the aristocratic spirit, so essential to Montesquieu's concept, in de Lavie's frames. His acknowledgement of *justices* and *fiefs* as necessary

emphasises the balancing function of the democratic principle as follows: “*introduire dans la Monarchie le bonheur des Républiques, et placer au milieu des Républiques la force de la Monarchie.*”¹⁰⁷

The lawyers in the *parlement* draw on Montesquieu’s plea for the role of *parlement* as an intermediary and keeper of law. In accord with Montesquieu the attorney general at the Parlement de Provence Ripert de Monclar calls for the preservation of aristocratic hierarchy:

“*Je n’entends pas bien cet axiome, que sans monarque point de noblesse, sans noblesse point de monarque ... Mais je pense avec l’auteur [i.e. Montesquieu]... que la distinction des ordres et des rangs intermédiaires convient admirablement bien à la Monarchie; qu’un corps de noblesse sert merveilleusement à tempérer les excès du gouvernement, non point comme une barrière élevée par les lois contre le despotisme, mais comme un rempart de moeurs, de préjugés, de sentiments, de principes d’honneur et d’élévation.*”¹⁰⁸

In his *Lettres historiques sur les fonctions essentielles du Parlement; sur le droit des pairs, et sur les Loix fondamentales du Royaume* (1753/1754) Le Paige exalts the aristocratic principle: *Parlement* (as) *corps intermédiaire subordonné et dépendant* in II, 4 of *De l’Esprit des Loix* is turned into a *sénat suprême*.¹⁰⁹ This aristocratic tendency of *Lettres historiques sur les fonctions essentielles du Parlement; sur le droit des pairs, et sur les Loix fondamentales du Royaume* by Le Paige can also be found in the *Dissertation sur l’origine et les Fonctions essentielles du Parlement; sur la Pairie, et le droit des Pairs; et sur les loix fondamentales de la Monarchie Française*, published in 1764 by Michel de Cantalauze de La Garde, *conseiller* in Toulouse.¹¹⁰ While the former does not cite *De L’Esprit des Loix*, the latter borrows from Montesquieu’s work: “*Peut-on concevoir une Monarchie sans des Loix fondamentales, et des Loix fondamentales sans un dépôt fixe où elles reposent avec sûreté?*”¹¹¹

3.2. Reception in the *Remontrances* of the French *parlements*

There is a strong transfer of political and philosophical ideas from Montesquieu to the *parlements*. On the one hand, demands expressed by the *parlements*, which articulated their vital function for the state before 1748, are clearly recognisable in Montesquieu’s discourse (linguistic expression).¹¹² Those demands are documented in the *Remontrances sur les Évocations des Parlement de Paris* of January 9 1731: « *Nos rois ont regardé dans tous les temps*

elements of a monarchic form of government is rather short (Ibid., t I, liv I, chap XIV, 125 seq.).

¹⁰⁷ De Lavie (N. 99), at t II, liv 6, chap 12, 398 seq.

¹⁰⁸ Frederic Sclopis, “Fragments d’un commentaire sur l’Esprit des Loix, par Ripert de Monclar, publiés par le Comte Sclopis” (1885) 17 *Memorie della Reale Accademia di Torino, serie seconda* 17 184 et seq.

¹⁰⁹ Louis-Adrien Le Paige, *Lettres historiques sur les fonctions essentielles du Parlement; sur le droit des pairs, et sur les Loix fondamentales du Royaume, 2^e partie*, (Aux dépens de la Compagnie, 1753-1754), at lettre 8, 167.

¹¹⁰ Michel de Cantalauze de La Garde, *Dissertation sur l’origine et les Fonctions essentielles du Parlement; sur la Pairie, et le droit des Pairs; et sur les loix fondamentales de la Monarchie Française* (Aux dépens de la compagnie, 1764), at 66 seq., 106. Basis and essence of the works of Le Paige and Michel de Cantalauze de La Garde is the right of the Parlements to take part in the law-making process.

¹¹¹ De Cantalauze de La Garde (n. 109), at 31.

¹¹² Cf. the restrictions to the royal plenitudo potestatis by way of ordonnances as repeatedly stressed in earlier *Remontrances*. (Flammermont, *Remontrances du Parlement de Paris au XVIII^e Siècle*, t. I : 1715-1753, Genf 1888, at LXXIX).

leur parlement comme le dépositaire perpétuel et immédiat de leur justice souveraine; »¹¹³

On the other hand however, the *remontrances* which were written after 1748 contain reminders of *De L'Esprit des Lois*: On September 27, 1751 Claude Adrien Helvétius (1715-1771) wrote to Montesquieu:

« *Avez-vous lu toutes les remontrances du Parlement de Paris et n'y avez-vous point remarqué comme nous que c'est dans l'Esprit des lois qu'on a puisé toutes ces belles maximes sur l'autorité? »¹¹⁴*

La Beaumelle describes one draft of the *Remontrances* of February 6 1753 as follows: “*C'est un traité admirable sur notre constitution, et tout tiré de l'Esprit des lois.*”¹¹⁵ The *Grandes Remontrances sur les Refus de Sacrement* of April 9 1753¹¹⁶ imploring the “*gradation de pouvoirs intermédiaires*” and the “*dépôts sacrés*”, as well as the *Séance Royale, dite de la Flagellation* of 3 March 1766¹¹⁷ praising the authority of the *parlements* as “*tribunaux dépositaires par état des lois inviolables qui forment le droit sacré de la Nation*”¹¹⁸ and as “*gardien respectif*” and the *Remontrances sur l'évocation du Procès Criminel de MM. de la Chalotais et Consorts* of December 5-8, 1766 arguing with the *lois fondamentales*¹¹⁹ and the *lois, nées avec la Monarchie*¹²⁰ are based on Montesquieu's wording relating to the balancing function of the aristocracy. The *Parlements* of the provinces also draw heavily from *De l'Esprit des Lois*¹²¹ as the Marquis d'Argenson observes: “*Le président de Montesquieu a monté l'éloquence de ce genre, et chacun l'imité avec succès.*”¹²²

3.3. Montesquieu's Reception within Constitutionalism around 1776 and 1789

The extensive reception of Montesquieu's *De L'Esprit des Lois* in pro-aristocratic

¹¹³ *Remontrances sur les Évocations des Parlement de Paris, 9.1.1731* (Flammermont, as note 112, at 232 seq., here 234).

¹¹⁴ François Gébeline ed., *Correspondance de Montesquieu*, vol. II, Paris 1914), at 379.

¹¹⁵ Archille. Le Sueur, *Maupertius et ses correspondants, lettres publiées par l'abbé A. Le Sueur*, Paris 1897, at 209. The cited passage can be found in a letter by La Beaumelle sent to Pierre Louis Moreau de Maupertuis (1698-1759), who was – as French physicist and mathematician – a member of the Académie des Sciences from 1723 and who was at Voltaire's instigation, appointed President of the Prussian Academy of Sciences in 1746.

¹¹⁶ Flammermont, note 112, at 506 seq., here 568, 569.

¹¹⁷ Jules Flammermont and Maurice Tourneux eds., *Remontrances du Parlement de Paris au XVIII^e Siècle*, tome II, Imprimerie Nationale, Paris 1895, at 554 seq., here 557.

¹¹⁸ *Ibid.*, at 417 (Remontrance du Parlement de Paris of 26.12.1763).

¹¹⁹ Flammermont, note 112, at 506 seq., here 522.

¹²⁰ Flammermont/Tourneux, note 117, at 663 seq.

¹²¹ Cf. the declaration of the Parlement de Bordeaux of 21.3.1759, in: *Recueil d'arrêtés, articles et remontrances de différentes classes du Parlement. S. l.*, 1759, 75 (B.N. Lb³⁸ 807); Declaration of the Parlement de Grenoble of 25.3.1759, in: *Recueil d'arrêtés, articles et remontrances de différentes classes du Parlement. S. l.*, 1759, 77 (B.N. Lb³⁸ 810). Remontrances du Parlement de Toulouse au Roi du 9.8. 1760, S. l. n. d., (B.N. Lb³⁸ 851); Declaration of the Parlement de Grenoble of 10.4.1759, in: *Recueil d'arrêtés, articles et remontrances de différentes classes du Parlement. S. l.*, 1759, 5 seq. (B.N. Lb³⁸ 807). Declaration of the Parlement d'Aix of 5.11.1756, in: *Remontrances du Parlement de Provence au Roi, sur le second vingtième, et autres droits (Datées du 5 novembre 1756, jointes aux Remontrances du même Parlement, de juin 1749) S. l n.d.*, 55 (B.N.LB³⁸ 709).

¹²² René Louis de Voyer de Paulmy Argenson ed., “Marquis d'Argenson, Remarques en lisant”, in *Mémoires et journal inédit du marquis d'Argenson, ministre des Affaires étrangères sous Louis XV, publiés et annotés par M. le marquis d'Argenson*, Paris 1858, at 5: 149.

literature, amongst the parliamentary nobility (*noblesse de robe*) and in the *remonstrances* of the *Parlements* confirms the interpretation of the mixed constitution (XI, 4: *le pouvoir arrête le pouvoir*¹²³) as a balance of the socio-political powers, which does not call for an institutional control of the monarchical executive through the legislative, but rather equilibrium within the governmental body constituted by the different social powers.¹²⁴ Therefore, Montesquieu cannot be cited as progenitor of the separation of powers-doctrine anymore. This leads to the question, whether ‘sovereignty’ and ‘separation of powers’ are clearly defined around 1776 and 1789.¹²⁵

3.3.1. American Constitution of 1787

The Constitution of the United States of America, adopted in 1787, designed a federal state with a strong centralised power. With the American founding fathers having Blackstone’s *Commentaries* as a model, the image of the President as surrogate monarch was already on the table.¹²⁶ Despite accountability to Congress (Art. 2 s 3), the President does not depend on the Congress. The President in turn cannot dissolve Congress. The President’s staff consists of his personal advisers and is not accountable to Congress. The President’s important role in the legislative process, despite having no formal right of legislative initiative, emerges from the right to “recommend to their consideration such measures as he shall judge necessary and expedient” (Art. 2 s 3). Further, the President has a suspensive veto (Art. 1 s 7).¹²⁷ Such a balance between the presidential executive and the parliamentary legislative seems to borrow from the old dualism between monarch and estates.

The delimitation of competencies between the Union and the States (Art. 1 ss 8, 9, 10) is, along with the separation of powers (Art. 1 s 1 and Art. 2 s 1) the leading constitutional theme in the organisation of the state, which is reflected in the *Federalist Papers* by Hamilton (1755-1804), Jay (1745-1829) and Madison (1751-1836).¹²⁸ Their analysis of the three powers (Legislature: Art. 55-66; Executive: 67-77; Judicial: 78-83) puts forward the

¹²³ Ibid. XI, 4 (395).

¹²⁴ Cf. the balance between the three principles within the legislature: the executive’s right to veto (“*faculté d’empêcher*”; XI, 6 at 401), the two-chamber system (“*au corps des nobles et au corps qui sera choisi pour représenter le peuple*”; XI, 6 at 401) and the conservative aristocracy’s freedom to adopt the law in its favour (“*à modérer la loi en faveur de la loi même*”; XI, 6 at 404). This is the only possible explanation for Montesquieu’s view that the executive had implicit restrictions – clearly opposing the common understanding of the *ancien régime* as a police state: “*Car l’exécution, ayant ses limites par sa nature, il est inutile de la borner*” (XI, 6 at 403).

¹²⁵ Müßig, *Die Europäische Verfassungsdiskussion des 18. Jahrhunderts* (The European Constitutional Discourse of the 18th century), Tübingen 2008, p. 34 et seq., p. 103 et seq., p. 126 et seq.

¹²⁶ “The executive power shall be vested in a President” (Art. 2 s 1).

¹²⁷ Legislation (Art. 1 ss 1, 8) and the budgetary sovereignty (Art. 1 s 7) are subject to the two chambers of Congress: the House of Representatives, the elected representatives of the people (Art. 1 s 2), and the Senate, the representatives of the individual states (Art. 1 s 3). The bicameral system was created to enable compromises between the interests of the big states and the small ones. In the House of Representatives, every state is to have representatives according to its size (Art. 1 s 2); in the Senate, according to the principle of equality of the states, every state is to have two senators (Art. 1 s 3).

¹²⁸ Originally thought of as a collection of essays on the Constitutional Convention’s draft to move the citizens of New York to accept it, it is nowadays accorded the rank of an authentic commentary on the constitution.

idea of a mixed constitution, in which, borrowing from Montesquieu's phrasing,¹²⁹ every power is accorded a virtue according to its function: the legislative, prudence, because of the plurality in advising; the executive, energy, because of its concentration of power in one person; and the judicial, justice, because of its impartiality arising from the judges' irremovability.

The supremacy of the constitution is not laid down in the text of 1787.¹³⁰ This seems to owe to the discussion leading from the 1760's, which saw *judicial review* in contradiction to popular sovereignty, which according to its preamble¹³¹ legitimates the constitutional legislation. This can only be understood by reference to the English common law. In the leading *Bonham's Case*¹³², known also in the colonies, Coke formulated the precedence of *common law* even over the laws of Parliament.¹³³ The counter-position is found in Blackstone's commentaries: "*Where the common law and a statute differ, the common law gives place to the statute*"¹³⁴. Parliamentary sovereignty¹³⁵ establishes the precedence of the legislature over the judiciary. But even before Blackstone's definition of parliamentary sovereignty was able to gain a foothold in the colonies, the position that there must be limitations for Westminster gained the upper hand in the American discourse. With this we are back again at the justification of the American Revolution as resistance against the unconstitutional action of the English Parliament. It is true that the elected colonial representative bodies do not expressly refer to the invalidity of unpopular parliamentary laws in the protest against the motherland,¹³⁶ but popular sovereignty took parliamentary

¹²⁹ Concentration of power threatens the freedom; that is the reason why powers have to be divided. Control and cooperation require nevertheless a partial interconnection between the legislative, executive and judiciary. To realize the interconnection of any merger, an internal control mechanism is to be established, the principle of the "republican rivalry": You must ensure that ambition will counter ambition. Official and self-interest must meet (Alexander Hamilton/James Madison/John Jay, *The Federalist Papers*, Buccaneer Books, Cutchogue N.Y 1992, 266 seq., 340 seq., 392 seq.).

¹³⁰ Since the Supreme Court's decision in *Marbury v. Madison* (5 U.S. (1. Cranch) 137 (1803)), the competence to decide about the constitutionality of laws passed by Congress is recognized.

¹³¹ "*We the people of the United States do ordain and establish this constitution for the United States of America.*" (cited by Willoweit/Seif (Eds.), *Europäische Verfassungsgeschichte* (European Constitutional History), München 2003, 255).

¹³² "*And it appears in our books that in many cases the common laws will control acts of parliament and sometimes adjudge them to be utterly void: for when an act of parliament is against common right or reason, or repugnant or impossible to be performed, the common law will control it and adjudge such act to be void.*" (8 Co. Rep. 107a = 77 ER 638; Theodore F.T. Plucknett, *Bonham's Case and Judicial Review*, in: Harvard Law Review 40 (1926/27), 34).

¹³³ The issue of sovereignty is left undecided by Coke (See also George L. Mosse, *The Struggle for Sovereignty in England: From the reign of Queen Elizabeth to the Right of Petition*, East Lansing, Michigan 1950, 160-161).

¹³⁴ Blackstone, *Commentaries* (see chap. 2, n. 38), Introduction sec. 3 (Of the laws of England), 89. Also on this John V. Jezierski, *Parliament and People: James Wilson and Blackstone on the Nature and Location of Sovereignty*, Journal of the History of Ideas 32 (1971), 95 seq.

¹³⁵ Concerning Parliament's claim of sovereignty as the highest common law court in the English constitutional struggles of the 17th century, see Müßig, note 38, 48 seq.

¹³⁶ House of Burgesses of Virginia 1764: "*And if it were proper for the Parliament to impose Taxes on the Colonies at all, which the Remonstrants take Leave to think would be inconsistent with the fundamental Principles of the Constitution, the Exercise of that Power at this Time would be ruinous to Virginia.*" (Edmund S. Morgan (Editor), Prologue to Revolution. Sources and Documents on the Stamp Act Crisis, 1764-1766, Chapel Hill 1959, 17); Resolution of Maryland 1765: "*Unconstitutional and a Direct Violation of the Rights of the Freemen of this Province*" (Resolution of Maryland, September 28, 1765, *ibid.*, 53); Resolution of Massachusetts 1765: "*That all Acts made, by any Power whatever, other than the General Assembly of the Province, imposing Taxes on the Inhabitants are Infringements of our inherent and unalienable Rights, as Men and British Subjects: and render void the most valuable*

sovereignty off the table. The idea of popular sovereignty is formulated by the *Committee of Correspondence* of the city of Boston for the first time in 1772, which quickly spread to the other colonies.¹³⁷ With the Virginia Bill of Rights of 1776, the dam broke.¹³⁸

In the 1787 Constitution, the implementation of popular sovereignty is rather restrained in contrast to the celebratory rhetoric of the Preamble. The conservative reservations were too strong against the people as the sovereign. In the Philadelphia Constitutional Convention, the conviction that unlimited popular sovereignty could endanger the Constitution still prevailed.¹³⁹ The exclusion of direct popular involvement in the constitutional amendment process, and the introduction of the bicameral system went in the same direction.¹⁴⁰ But even if the solution was to be found in the limitation of sovereignty by the Constitution, a judicial review action was not included into the 1787 text, as there was no majority in the Convention for so strong a constitutional jurisdiction.¹⁴¹

Declarations of our Charter" (ibid., 57).

¹³⁷ "All men have a Right to remain in a State of Nature as long as they please: And in case of intolerable Oppression, Civil or Religious, to leave the Society they belong to, and enter into another. – When Men enter into Society, it is by voluntary consent; and they have a right to demand and insist upon the performance of such conditions, and previous limitations as form an equitable original compact. – Every natural Right not expressly given up or form the nature of a Social Compact necessarily ceded remains. – All positive and civil laws, should conform as far as possible, to the Law of natural reason and equity." (Harry Alonzo Cushing (Editor), *The Writings of Samuel Adams*, vol. 2, repr. New York 1904 – 1908, 351 – 352 (Highlighted in the original). Concerning the revolutionary theoretical significance of the idea of popular sovereignty in the American Revolution see among many Elisabeth Charlotte Engel, *Über das Wesen der amerikanischen Revolution* (About the nature of the American Revolution), in: Karl Erich Born (Editor), *Historische Forschungen und Probleme: Festschrift Peter Rassow* (Historical research and issues: Commemorative publication for Peter Rassow), Wiesbaden 1961, 211; Hannah Arendt, *On Revolution*, New York 1963, 152; Gordon S. Wood, *The Creation of the American Republic 1776-1787*, New York 1972, 353-354, Willi Paul Adams, *Republikanische Verfassung und bürgerliche Freiheit. Die Verfassungen und politischen Ideen der amerikanischen Revolution* (Republican Constitution and civil liberty: The Constitution and the political ideas of the American Revolution), Darmstadt/Neuwied 1973, 138-140.

¹³⁸ "That all power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants, and at all times amenable to them [...] that government is, or ought to be, instituted for the common benefit [...]; and that, when any government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, inalienable, and indefeasible right to reform, alter, or abolish it, in such manner as shall be judged most conducive to the public weal" (William F. Swindler (Editor), *Sources and Documents of United States Constitutions*, vol. 10, New York 1972-1979, 49). See also Gerald Stourzh, *Die Konstituierung der Individualrechte: Zum 200. Jahrestag der 'Declaration of Rights' von Virginia vom 12. Juni 1776* (The constitution of individual rights. On the 200th Anniversary of the 'Declaration of Rights' by Virginia of 12 June 1776), *Juristenzeitung* 31 (1976), 397 seq).

¹³⁹ "The real source of danger to the American Constitutions", James Madison at the meeting of July 21, 1787, cited in Max Farrand (Editor), *The Records of the Federal Convention of 1787*, New Haven 1911, vol. 2, 74.

¹⁴⁰ Constitutional amendments require a two thirds majority in both houses of Congress and must also be ratified by three fourths of the States by legislatures or constitutional conventions (Art. V).

¹⁴¹ For details Horst Dippel, *Die Sicherung der Freiheit. Limited government versus Volkssouveränität in den frühen USA* (The protection of freedom. Limited government versus popular sovereignty in the early United States), in: Günter Birtsch (Editor), *Grund- und Freiheitsrechte von der ständischen zur spätbürgerlichen Gesellschaft* (Fundamental rights and freedoms from the estate-based to the late-bourgeois society), Göttingen 1987, 135 seq. (150).

3.3.2. Natural law program of the Encyclopédists

In the article “Monarchy” of the *Encyclopédie, ou dictionnaire raisonné des sciences, des arts et des métiers par une société de gens de lettres* (1751-80)¹⁴² Montesquieu’s traces are obvious: Only if the intermediary powers (*pouvoirs intermédiaires*) keep an appropriate political role, France will remain a monarchy, otherwise it is threatened to degenerate to despotism, a statement supported. This statement is to be understood in the context of the *Encyclopédist’s*¹⁴³ program, under the leadership of Diderot (1713-1784), until 1758 together with the mathematician and physicist Jean Baptiste Le Rond d’Alembert (1717-1783), which was to compile all the empirically accessible knowledge of the time. The aristocratic intermediary powers thus become a constant variable in the general will of the human race, which Diderot, in his article on the *Natural Law*, deduces from a comparison of the natural affects of mankind, and the positive laws of all peoples, and goes on to declare a single ordering principle of the world.¹⁴⁴ This is a significant piece of evidence for my assertion that French absolutism was not defused by natural law.¹⁴⁵

3.3.3. Monarchical principle of the French 1791-September Constitution and the compromise of the national sovereignty

Within this context of the French Enlightenment, the masterminds of the French Revolution neither define “sovereignty” nor “separation of powers” in a clear way. Jean-Jacques Rousseau, in *Du Contrat Social ou Principe du Droit Politique* (1762), infers the indivisibility of the state power from the indivisibility of popular sovereignty.¹⁴⁶ In the

¹⁴² French Encyclopedia or on rational knowledge founded Lexicon of Sciences, Arts and Crafts, published by a company of scholars. First edition 35 volumes, Paris 1751 – 1780, Partial Edition in: Diderot, Laurent Versini (Editor), *Oeuvres*, 5 volumes, vol. 1 and 2, Paris 1994 and 1995. John Lough, *The encyclopédie*, Genf 1989; Paul Vernière, *Diderot et les contradictions de sa pensée politique*, 139 (1984), 269-285; Jacques Proust, *Diderot et l’encyclopédie*, 3rd editon, Paris 1995.

¹⁴³ The encyclopedia is a collective work. Diderot and D’Alembert who participated in the project until 1758, worked together with over 150 authors: D’Alembert (especially mathematics), J.-J. Rousseau (especially music, “économie politique”); Voltaire (including the articles “esprit” and “histoire” and É. B. de Condillac (philosophy), Montesquieu (“goût”), J.-F. Marmontel (literary criticism), Baron Holbach (natural sciences), Baron Turgot (national economy) and F. Quesnay (Posts “fermiers” “grains” in which he outlined the principles of physiocracy). Models of the 17 volumes of foil with about 72 000 articles were the *Dictionnaire Historique et Critique* of Pierre Bayle (2 volumes Rotterdam 1695/96; 4 volumes Rotterdam 1720; German edition Bayle, Günter Gawlick (Editor), *Historical and Critical Dictionary*, Hamburg 2003) and the *Cyclopaedia or An universal dictionary of arts and sciences* (London 1728) by Ephraim Chambers. According to the initial plan, the latter should be translated for the French book market. But the editors found too many gaps, so that their claim of wanting to put together all available knowledge of their time, was only possible by a complete revision.

¹⁴⁴ “VIII. Mais, me direz-vous, où est le dépôt de cette volonté générale? Où pourrai-je la consulter? . . . Dans les principes du droit écrit de toutes les nations policées; . . . que la soumission à la volonté générale est le lien de toutes les sociétés, sans en excepter celles qui sont formées par le crime. Hélas, la vertu est si belle, que les voleurs en respectent l’image dans le fond même de leurs cavernes! 5°. que les lois doivent être faites pour tous, & non pour un; autrement cet être solitaire ressembleroit au raisonneur violent que nous avons étouffé dans le paragr. . . .” (Diderot, “Droit naturel”, in: Diderot/D’Alembert (Editors), *Encyclopédie, ou dictionnaire raisonné des sciences, des arts et des métiers, par une société de gens de lettres*, vol. 5, Paris 1755, 116). See *ibid.*, 131-134.

¹⁴⁵ Müßig, *Verfassungsdiskussion* (note 125), p. 39 et seq.

¹⁴⁶ Rousseau, *Du contrat social ou Principe du Droit Politique*, book II, ch. 2 in: Robert Derathé and others (Editors), *The Pléiade edition of Rousseau’s Œuvres Complètes*, Paris 1964, 369: “Par la même raison que la

exercise of state power described in *Lettres Ecrites de la Montagne*, Rousseau deems the division of judiciary from government to be necessary, but not the division of executive and legislature.¹⁴⁷ Furthermore, the scheme for a representative model of government in the *Vues sur les moyens d'exécution dont les représentants de la France pourront disposer en 1789* (1788) by Emmanuel Joseph Sieyès is based on the Rousseauian “*volonté générale unitaire, imprescriptible, possédée par la nation, déléguée et exercée par ses représentants*”.¹⁴⁸ Correspondingly, Sieyès does not demand the separation of powers in his *Préliminaire de la Constitution: Reconnaissance et exposition raisonnée des droits de l'homme et du citoyen* of July 20/21, 1789.¹⁴⁹

While the Rousseauian freedom through participation in legislation (Art. 6) is a central message of the French Declaration of the Rights of Man and Citizen 1789, the doctrinaire emphasis on the Principle of Separation of Powers in Art. 16 cannot hide the fact that the principle of separation of powers is not clarified in 1789.¹⁵⁰ In the sovereignty of the nation, the relationship between the two sovereigns monarch and nation remains open. It is exactly this vagueness that finds its expression in the French September Constitution of 1791: the nation was sovereign (Art. Tit. III, Art. 1),¹⁵¹ from which all state power derives (Art. Tit. III, Art. 2),¹⁵² represented by the duality of popular representation and the monarch.¹⁵³ The monarchical principle was in accordance with this (Art. Tit. III, Ch. II Sec. I, Art. 2).¹⁵⁴

The executive power was vested in the King and his ministers (Tit. III, Art. 4).¹⁵⁵ The legislative power was vested in the National Assembly as a single chamber legislature,

souveraineté est inaliénable, elle est indivisible. Car la volonté est générale, ou elle ne l'est pas; elle est celle du corps du peuple, ou seulement d'une partie.” See Franz Neumann, *Die Herrschaft des Gesetzes* (The rule of law), Berlin 1980, 149 seq. However, contradictory Rosseau (ibid.), book III, ch.7, 414 (Pléiade edition): “*Le Gouvernement simple est le meilleur en soi, par cela seul qu'il est simple. Mais quand la Puissance exécutive ne dépend pas assez de la législative, c'est-à-dire, quand il y a plus de rapport du Prince au Souverain que du Peuple au Prince, il faut remédier à ce défaut de proportion en divisant le Gouvernement; car alors toutes ses parties n'ont pas moins d'autorité sur les sujets, et leur division les rend toutes ensemble moins fortes contre le Souverain.*”

¹⁴⁷ Rousseau, *Lettres Ecrites de la Montagne*, in: Robert Derathé and others (Editors), *Œuvres compl.* (note 146), 815, VII. Lettre: „D'abord la puissance Législative et la puissance exécutive qui constituent la souveraineté n'en sont pas distinctes.“ Rousseau knew Locke's treatises and claims to agree with him in his sixth letter of the *Lettres Ecrites de la Montagne* that is dedicated to the support of the Contract Social (at 812).

¹⁴⁸ E. J. Sieyès, *Vues sur les moyens d'exécution, dont les Représentants de la France pourront disposer en 1789*, in: Roberto Zapperi (Editor), *Écrits politiques*, Paris 1985, 54.

¹⁴⁹ Cited in François Furet/Ran Halévi (Editors), *Orateurs de la Révolution française, vol. 1: Les Constituants*, Paris 1989, 1016.

¹⁵⁰ For details see Seif, *Recht und Gerechtigkeit: Die Gewaltenteilungskonzeptionen des 17.-19. Jahrhunderts* (Law and Justice: The concepts of the separation of powers in the 17th-19th centuries), *Der Staat* 42 (2003), 110 seq., 117 seq.

¹⁵¹ Cited by Willoweit/Seif, note 131, 299. According to the radicalization of the war, the overthrow of the monarchy in 1793 and the terror of the committee of welfare of 1793/94, the Directory in 1795 evoked the sovereignty of Article 17 more intensively: “*La souveraineté réside essentiellement dans l'universalité des citoyens.*” (Cited ibid., 353). The Consulate Constitution in 1799 gilded the Napoleonic military dictatorship and avoided a statement.

¹⁵² Cited by Willoweit/Seif, note 131, 299.

¹⁵³ The compromise formula of ‘sovereignty of the nation’ is also found in the Polish May Constitution (Art. 5), in the Spanish Cádiz Constitution of 1812 (Title 1, Art. 2) and in the Belgian Constitution of 1831 (Art. 25), all cited by Willoweit/Seif, note 131, 281 et seq., p. 429 et seq. and p. 509 et seq.

¹⁵⁴ Cited by Willoweit/Seif, note 131, 310.

¹⁵⁵ Cited by Willoweit/Seif, note 131, 300.

which emphasised the unity of the nation and avoided a conservative upper house (Tit. III, Art. 3, Tit. III, Ch. I).¹⁵⁶ The right of legislative initiative was only accorded to the single chamber legislature (Tit. III, Ch. III, Sec. 1, Art. 1, No. 1).¹⁵⁷ The meeting of the legislative body was regulated in the constitution (Tit. III, Sec. V, Art. 1 & 5),¹⁵⁸ and not dependent on being called by the monarch. The king could not dissolve the National Assembly (Tit. III, Ch. I, Art. 5).¹⁵⁹ The ministers were appointed and dismissed by the king (Tit. III, Sec. IV, Art. 1),¹⁶⁰ and assumed by counter-signature (Tit. III, Sec. IV, Art. 4)¹⁶¹ the legal responsibility for the legality of the acts of government of the king (Tit. III, Sec. IV, Art. 5)¹⁶². Only in two particularities was the strict division between the executive of the king and his ministers from the single chamber legislature of the National Assembly modified: the king had a suspensive veto in the legislative procedure (Tit. III, Ch. III, Sec. 3, Art. 1 & 2),¹⁶³ and the legislature had a right of participating in foreign policy (Tit. III, Ch. III, Sec. 1, Art. 2)¹⁶⁴. Independent from the executive and the legislature was the unified judiciary supported by jury courts (Tit. III, Art. 5).¹⁶⁵

Sovereignty of the nation not only manages to integrate two sovereigns, but also joins the constitutional idea with national integration. Symbolizing the revolutionary pathos for equality, the idea of a French nation was expanded from that of a few privileged to all of the citizens, with a corresponding census. Thus, the French constitution of 1791 created a right of citizenship (Tit. II, Arts. 2-6),¹⁶⁶ and announced civil equality (Tit. I),¹⁶⁷ even though three sevenths of the French men because of poverty and French women altogether were excluded from the right to vote (Tit. III, Ch. I, Sec. II, Art. 2),¹⁶⁸ and the right to stand for election (Tit. III, Ch. I, Sec. III, Art. 3).¹⁶⁹ Therefore, the relationship between monarch and parliament is left open and exposed to the dynamics of the constitutional practise. This meant that the balancing of constitutional structures between the monarch and popular sovereignty happened in consensus. Constitutionalism only functions in a division of power between the constitutional variables which recognises the respective rights of the other. In the absence of such a consensus between the monarch

¹⁵⁶ Cited by Willoweit/Seif, note 131, 299 seq.

¹⁵⁷ Cited by Willoweit/Seif, note 131, 321.

¹⁵⁸ Cited by Willoweit/Seif, note 131, 308.

¹⁵⁹ Cited by Willoweit/Seif, note 131, 300.

¹⁶⁰ Cited by Willoweit/Seif, note 131, 319.

¹⁶¹ Cited by Willoweit/Seif, note 131, 319.

¹⁶² Cited by Willoweit/Seif, note 131, 320.

¹⁶³ Cited by Willoweit/Seif, note 131, 326.

¹⁶⁴ Cited by Willoweit/Seif, note 131, 322 seq.

¹⁶⁵ In the four-months-old Polish Constitution of 1791, the sovereignty of the nation is also seen as the origin of all state authority (Article 5). The monarchical executive (Article 7) was opposed by a permanent two-chamber legislature made up of deputies and Senator from office affairs (Article 6). The judicial power was separated from the executive and legislative power (Article 8). Cited by Willoweit/Seif, note 131, 284, 286 seq., 289 seq.

¹⁶⁶ Cited by Willoweit/Seif, note 131, 297 seq.

¹⁶⁷ Cited by Willoweit/Seif, note 131, 294 seq.

¹⁶⁸ Cited by Willoweit/Seif, note 131, 302.

¹⁶⁹ Cited Willoweit/Seif, note 131, 305. The 1795 directorial constitution regulated in Title II the civil rights and a vote tied to census. In Title I, the Consulate Constitution of 1799 had also regulations of civil rights as a content.

and parliament, as was the case in France in 1792, the constitutional system collapsed due to a constant conflict between the two rivals.

4. Openness of the constitutional movement after 1830/1831 for a balance between monarchical sovereignty and popular sovereignty: fluent transition from constitutionalism to parliamentarism

The consensus between monarch and the representation of the people is the prevailing aim of the constitutions after 1830. Instead of the old dualism of monarch and the assembly of the estates, what mattered was rather that the monarch acted in accordance with the people's representations. This principle of consensus was specified by the necessary approval of the monarch to the laws, resolved by the people's representation or by the monarchical right to veto against legal proposals, be it definite or just dilatory. Hence, an acting of the monarch in accordance to the majority of the people's representation could result in the constitutional practice, particularly since the establishment of a trusting relationship was politically astute due to the budgetary right of the people's representations. The necessity of balancing the monarchical government and the other constitutional powers was formulated by François Guizot, Prime Minister of the July monarchy 1840-1848: "*Le devoir de cette personne royale ... c'est de ne gouverner que d'accord avec les autres grands pouvoirs publics...*"¹⁷⁰. Consequently, an ongoing need for negotiation about the limitations of the monarchical competencies about the responsibility of the ministers and about the treatment of the chambers in order to obtain the majority, originates according to Guizot's argumentation: "*Quelque limitées que soient les attributions de la royauté, quelque complète que soit la responsabilité de ses ministres, ils auront toujours à discuter et à traiter avec la personne royale pour lui faire accepter leurs idées et leurs résolutions, comme ils ont à discuter et à traiter avec les chambres pour y obtenir la majorité.*"¹⁷¹. Thus, a fluent passage from the constitutional to the parliamentary system can be observed. Evident for this is the understanding of the constitutional practice after 1830/1831 as shaped in French research as "*parlementarisme à double confiance*"¹⁷²: the government of the monarch is admittedly formally not bound to the parliamentary majorities, however, their consideration is political normality. The fluent passage from the constitutional to the parliamentary system could be accelerated, curbed or stopped. Thus, a substantial boost in parliamentarisation took place in France, Belgium and England around 1830.

4.1. Constitutional movement after the Paris July revolution 1830

¹⁷⁰ Cited in Ponteil, *Les institutions de la France de 1814 à 1870*, Paris 1966, 151.

¹⁷¹ Cited in Ponteil, note 170, 151.

¹⁷² Duverger refers to a "*parlementarisme orléaniste*", marked by parliamentarism "*à double confiance*", which he saw realized not only in France in the time of 1830-1848, but also in the Great Britain of the 18th century until 1834. Maurice Duverger, *Le système politique français: Droit constitutionnel et systèmes politiques*, 19th edition, Paris 1986, 24 seq., 85. The idea of "double trust" is also found in the Italian constitutional commentary of 1909, which states in the context of the characterization of the "*governo parlamentare*": "*i Ministri, pur essendo Ministri del Re ... hanno costante bisogno della duplice fiducia del Re e della Camera*" (Francesco Racioppi/Ignazio Brunelli, *Commento allo Statuto del Regno*, 3 volumes, Torino 1909, 285-286).

The conflicts, simmering since 1827 between the chamber of deputies¹⁷³ and Charles X (1757-1836) escalated in the so-called July revolution 1830. In an unconstitutional abuse of emergency regulations, the King and his unpopular government under the counter-revolutionary Prince Jules de Polignac¹⁷⁴ dissolved the newly elected chamber of representatives because of their liberal majority, even before it could convoke. The liberty of the press was virtually abandoned and the election census was raised in favour of the conservative big landowners. The population of Paris stood up against these July ordinances and achieved the overthrow of Charles X. As already in 1789, in 1830 social discontentedness coupled with political protest.¹⁷⁵

Even before the July revolution, the chamber of representatives had decided to revise the Charte of 1814 in cooperation with the Chamber of Pairs. Substantial changes compared to 1814 took place under the revolutionary pressure: Both Chambers received the right of legislative initiative (Art. 15). The Chamber of Pairs was no longer a privy chamber of nobles with hereditary seats, but rather an assembly of notables, to which also wealthy citizens could be appointed for life (Art. 23). The right to make regulations was subject to the primacy of law (Art. 13). There was no longer a general authorisation for ordinances “for national security” (Art. 14 in the end of the 1814 Charte: “*et fait les règlements et ordonnances nécessaires pour l’exécution des lois et la sûreté de l’État*”¹⁷⁶). Apart from that, the strong monarchical executive persisted (Art. 12). The ministers were appointed and dismissed by the monarch and took over legal responsibility for the lawfulness of monarchical acts of government by counter-signature (Art. 12). This legal responsibility was sanctioned by ministerial impeachment. A political responsibility of the ministers was not envisaged.

A shift of power in favour of the parliament did not happen, because a firmly structured party system lacked in the France of the July monarchy. There were only the two big movements of the liberal conservative “*résistance*” (*Centre droit* and *Doctrinaires*) and the reform-liberal “*mouvement*” (*Centre gauche* and *Gauche dynastique*). Republican groups, whose followers mostly belonged to the middle and lower classes were not represented in the Chamber of Deputies because of the high electoral census. Further, many civil servants (*députés fonctionnaires*)¹⁷⁷ were among the deputies. Thus, the influence of Louis-

¹⁷³ After the dissolution of the chamber conducted by Villèle in 1827, the government loses its majority in Parliament. The new head of government Martignac was not only defeated in a vote on a law about the reform of the municipal and departmental administration (1829) but he also failed to gain the king’s trust. The latter welcomes Martignac’s parliamentary defeat as an opportunity to impose a government fully to his liking led by his confidant Prince Jules de Polignac.

¹⁷⁴ Prince Jules de Polignac was conceived as representative of the counter-revolutionary emigrants of the first hour, who tried to role back the revolution militarily from abroad. La Bourdonnaye stood for the open hatred of these emigrants focused on the new France which led to the ‘White Terror’ after Napoleon’s second defeat, and finally Bourmont, who had the inglorious reputation of a general having betrayed Napoleon in the decisive moment the day of Waterloo. Thus, at the time, an oppositional daily newspaper was able to publish: “*Coblence, Waterloo, 1815! Voilà les trois principes, les trois personnages du ministère!*” (Coblence, Waterloo, 1815! There, the three principles, the three characters of the ministry!) (André Jardin/André-Jean Tudesq, *La France des notables*, vol. 1: *L’évolution générale 1815-1848* (Nouvelle histoire de la France contemporaine 6), Paris 1973, 83 seq., 114 seq. citation 117).

¹⁷⁵ Magraw, *France 1815-1914. The Bourgeois Century*, 3rd impr., London 1992, 41 seq.; Rosanvallon, *La monarchie impossible: Les Chartes de 1814 et de 1830*, Paris 1994, 290-296.

¹⁷⁶ Cited in Willoweit/Seif, note 131, 486.

¹⁷⁷ Of the 459 representatives 188 were part of the “*députés fonctionnaires*”, 78 were part of the liberal professions (out of these 62 lawyers), 308 were part of the “*propriétaires sans activité professionnelle*”, about 40

Philippe on the formation of government remained uncontested.¹⁷⁸ Just four of overall ten prime ministers between 1830 and 1840 could provide the office next to the crown with a personal profile (Perier, de Broglie, Thiers, Guizot). The monarch never appointed a government that was contrary to cameral majority, so that his appointments actually showed the monarchical influence, but did not contravene parliamentary policies. However, Louis-Philippe acted explicitly against the parliamentary majority when he dismissed the government of Thiers twice in 1836 and 1840, which had to resign not because they lacked support in the chamber of deputies but because of the quarrel with the King about questions of foreign policy.¹⁷⁹ However, the parliament did not react to these dismissals with a challenge against the King as in England 1835 and 1841, but it rather tolerated the newly formed cabinet.¹⁸⁰ Even though the government Soult-Guizot could have practiced a policy independent from the King with the help of parliamentary

representatives come from the world of the bourgeoisie of industries, trade and finance, among them renowned names such as Joseph Perier or the “*maître de forges*” Schneider. Comparing these pieces of information with the statistics from 1834, during these 12 years a clear shift in favour of the „*propriétaires*”, and an increase of the “*deputés fonctionnaires*” happened, while the proportion of the business world even decreased slightly; 1834: 23 % lawyers and judges, 18 % civil servants, 22 % „*propriétaires*“, 17% leading members of the business community, 14% military and 7% liberal professions (without lawyers). Statistics for 1846: Jardin/Tudesq, *Nouvelle Histoire de la France contemporaine*, tome 6: *La France des notables, l'évolution générale, 1815-1848*, Paris 1973, 171 seq., 157 seq.; for 1834: Thomas D. Beck, *French Legislators, 1800-1834: A Study in Quantitative History*, Berkeley 1974, 148, 184; the reasons for the long-term changes of political participation between 1789 and 1848 are controversial: Peter McPhee, *Electoral Democracy and Direct Democracy in France 1789-1851*, in: *European History Quarterly* (EHQ) 16 (1986), 77 seq. 86 seq.; with a different accentuation: Melvin Edelstein, *Aux urnes citoyens! The Transformation of French Electoral Participation (1789-1870)*, in: Gail M. Schwab/John R. Jeanneney (Editors), *The French Revolution of 1789 and Its Impact*, Westport 1995, 199 seq., 203 seq.

¹⁷⁸ Jean-Jacques Chevallier/Gérard Conac, *Histoire des institutions et des régimes politiques de la France de 1789 à nos jours*, 8th edition, Paris 1991, 177 seq.; Jardin/Tudesq, note 177, 140 seq., 146 seq.; Ponteil, note 169, 151 seq.

¹⁷⁹ In the light of this great influence of the king on the government, it appears reasonable not to talk about a parliamentary monarchy when referring to the constitutional system of the French July Kingdom. Although it is the French literature that emphasizes the important political influence of Louis-Philippe, it does not raise any doubts about the parliamentary character of the system or remains ambivalent in its judgment, as Duverger, who ultimately talks about “*parlamentarisme orléaniste*”, while at the same time dealing with it under the heading “*Les monarchies semi-parlementaires*”. Duverger, note 172, 73, 85; more skeptic towards the parliamentary character: Robert Hervé, *L'orléanisme (Que-sais-je? 2706)*, Paris 1992, 18 seq., 39 seq. (“*monarchie pré-parlementaire*”); tending more towards parliamentarism for instance: Chevallier/Conac, *Histoire des institutions* (note 178), 186 seq. (“*parlamentarisme dualiste*”); Bastid, *Les institutions politiques de la monarchie parlementaire française (1814-1848)*, Paris 1954, 409 seq. (“*régime parlementaire dualiste*”); Yves Guchet, *Histoire constitutionnelle française (1789-1958)*, 2nd edition, Paris 1990, 168 seq.; Wolfgang J. Mommsen, *1848: Die ungewollte Revolution: Die revolutionären Bewegungen in Europa 1830-1849* (1848: The unwanted revolution: The revolutionary movements in Europe 1830-1849), Frankfurt on the Main 1998, 43; only emphasis on the dualist character: Pasquale Pasquino, *Sur la théorie constitutionnelle de la monarchie de Juillet*, in: Marina Valensise (Editor), *François Guizot et la culture politique de son temps*, Paris 1991, 111 seq., 120 seq.; clear classification into the category of parliamentarism: Ponteil, *Institutions de la France* (note 170), 150 seq.; Morabito/Bourmaud, *Histoire constitutionnelle et politique de la France (1789-1958)*, 3rd edition, Paris 1993, 212 (“*véritable monarchie parlementaire*”); Romuald Szymkiewicz/Jacques Bouineau, *Histoire des institutions 1750-1914: Droit et société en France de la fin de l'Ancien Régime à la Première Guerre mondiale*, Paris 1989, 403; Pierre Rosanvallon, *La monarchie impossible: Les Chartes de 1814 et de 1830*, Paris 1994, 10.

¹⁸⁰ Morabito/Bourmaud, note 179, 208 seq.; Bastid, note 179, 305 seq., 310 seq.; Jardin/Tudesq, note 177, 142 seq., 151 seq.; Guy Antonetti, *Louis-Philippe*, Paris 1994, 750 seq., 763 seq., 819 seq.

majority after the electoral victory of 1846, the relationship of trust to the monarch remained strong. Thus, research agrees that Guizot's powerful position in the cabinet and his long term of government 1840-1848 can be explained directly with the good relationship to Louis-Philippe and the mutual agreement of important political landmark decisions.¹⁸¹

The *Charte Constitutionnelle* 1830 is not imposed, but rather agreed upon between the *chambres assemblées* and the monarch.¹⁸² The appointment of Louis-Philippe as king by the *chambres assemblées*, who took an oath on the *Charte* at August 9, 1830, makes the monarchy a *pouvoir constitué*. This also shows the changed imperial title: The Duke of Orleans, who descended from a branch line of the Bourbonian Royal House, could have been coronated as Philippe VII 'King of France'.¹⁸³ Contrary to that he calls himself Louis-Philippe and reigns as 'King of the French' a people that appoints their 'Citizen King' in its own right. The Bourbonian fleur-de-lys gives way to the revolutionary tricolour. Louis-Philippe takes his coronation oath no longer on the Bible, but rather on the Constitution, and no longer in the coronation cathedrals of Reims or Notre Dame de Paris, but rather before the chamber.

Because of the relatively high electoral census, the chamber remained in the hands of the propertied bourgeoisie and the property-owning nobility (*juste milieu*). The July revolutionaries, coming from the middle and lower classes were not represented.¹⁸⁴ Just as the civil reform movement attends to the extension of the right to vote since 1847,¹⁸⁵ the February revolution of 1848 takes place under the impression of the incipient economic crisis. The civil-liberal modified constitutional monarchy is replaced with a radical-democratic (second) republic, which is abandoned just like the republic of 1793¹⁸⁶ by a dictator, who proclaims himself as Emperor Napoleon (reg. 1852-1876) shortly after. Even though the high census is just marginally extended, the first title of the constitution (Public Law of the French) begins with the guarantee of equality (Art. 1). Among the civil

¹⁸¹ Jardin/Tudesq, note 177, 156 seq.; Morabito/Bourmaud, note 179, 209 seq.

¹⁸² The proposal made by a representative to submit the amended constitution to a referendum was declined by the other representatives.

¹⁸³ Cf. a.o. Hugh A.C. Collingham, *The July Monarchy: A Political History of France 1830-1848*, London 1988, 26 seq.

¹⁸⁴ The representatives elected before the July revolution managed to push through their favourite candidate as new King by getting the old Lafayette to support his application. Thus, the old revolutionary who even had participated in the American War of Independence and had been chairman of the Paris National Guard in 1789 could no longer stand for election as potential candidate for the Republican presidency with the result, that the revolutionaries were deprived of a popular leader. Henceforth, the nomination of Louis-Philippe also served as defence of claims for participation coming from the middle and lower classes that were participating in the revolution (Jardin/Tudesq, note 177, 115 seq., 119 seq.; Magraw, note 175, 41 seq., 46 seq.

¹⁸⁵ Since the rights of assembly and association were drastically aggravated after the numerous Republican labour revolts at the beginning of the July Monarchy 1835, the citizen reform movement organized semi-official banquets since 1847, during which invited politicians held fiery after-dinner speeches in favour of the extension of the right to vote. The beginning economic crisis of the same year created an explosive general mood, with the result of the prohibition of a planned reform banquet for February 22, 1848 providing for the final impetus for the revolution which ended the constitutional monarchy, unable to reform, in very few days and instead installed the Republic and the general right to vote. In 1848, it was for the third time after 1789 and 1830 that the call for just political participation in a time of socio-economic need lead to a revolution.

¹⁸⁶ Constitution of the French Republic from June 24, 1793.

liberties, the freedom of opinion and the abolishment of censorship is emphasised (Art. 7).

This *Charte* 1830 led to a Europe-wide constitutional movement, whereas due to the connection of the constitutional movement with national struggles for freedom, the people and its representation were invigorated as constitutional factors. Like in France, a parliament took over the task of drafting a constitution in Belgium after the Revolution of 1830: the constituent assembly, dominated by the liberal-catholic union, is *pouvoir constituant*, the newly-to-be-appointed King is just taking on the role as “*pouvoir constitué*”. Contrary to the French model, the Belgian Constitution is not negotiated with the monarch, but freely proclaimed by a national congress in its own right.¹⁸⁷

4.2. Belgian Constitution of 1831

Since the United Kingdom of the Netherlands was recreated at the Congress of Vienna in 1814/15 there were differences between the former territory of the Austrian Netherlands, later French territory since 1795, and the Northern part of the country. The new King William I did not manage to take the Belgian interests into account, or at least to permanently commit individual social or professional groups. The King scared the francophone liberal bourgeoisie away with his language policy of ‘Netherlandisation’, and his laicist school policy provoked the Catholic clergy. In this gap, a political union of Belgian liberals and Catholics was formed since 1827, which was suspiciously termed ‘Monster-verbond’ by the Dutchmen. Calls for freedom of language and teaching arose next to calls for freedom of the press, expansion of the right to vote and a liberalisation of the constitution. The heated political situation, which even intensified due to the socio-economic crisis (unemployment, harvest losses, price rise) 1829/30, vented under the impression of the French July revolution in August/September 1830 in a riot.¹⁸⁸ All parts of the population voiced their approval, whereas the so-called ‘*classe moyenne*’ played a pivotal role.

Against the paternalism of the Dutch part of the United Kingdom, the provisional government, formed by liberals and clericals declared the Independence of Belgium in Brussels at October 4, 1830. They scheduled the elections for a constituent body for November 3.¹⁸⁹ Two days after the Declaration of Independence, the provisional government already assembled a committee at October 6, 1830, which was entrusted with the draft of a constitution.¹⁹⁰ These constitutional consultations were motivated by the

¹⁸⁷ In the name of the Belgian people the National Congress concludes the beginning of the Belgian Constitution (Gosewinkel/Masing (Eds.), *Die Verfassungen in Europa 1789-1949* (The Constitutions in Europe 1789-1949), Munich 2006, 1307).

¹⁸⁸ As in Paris, the opera “*Die Stumme von Portici*” (The mute girl of Portici) lead to upheaval on August 25, 1830. Together with demonstrating workers, the audience stormed the Palace of Justice.

¹⁸⁹ Els Witte/Jan Craeybeckx, *La Belgique de 1830 à nos jours: Les tensions d'une démocratie bourgeoise*, 2nd edition, Bruxelles 1987, 5 seq.; Ernst Heinrich Kossmann, *The Low Countries. 1780-1940*, Oxford 1998, 151 seq.

¹⁹⁰ All of the 14 members of the constitutional commission with the exception of Brouckère were jurists. Jean Baptiste Baron de Nothomb (1805-1881) and Paul Devaux (1801-1880) formulated the bulk of the provisions themselves as secretaries of the commission while being oriented immensely towards the French constitutions of 1791, 1814/30, the Dutch constitution of 1815, and partially towards the English constitutional practice. Both of them were to play an important role within liberal ranks later on. Nothomb was the architect of the constitutional Belgian monarchy and envoy to the German Bundestag

pursuit of autonomy against the Dutch royal house and the constitutional structures from 1815. The national congress, elected by a mixed capital and educational census,¹⁹¹ within which the liberal-catholic union with aristocrat big landowners, educated bourgeoisie, and clergy had a strong majority, largely confirmed the draft constitution, revised by Nothomb and Devaux¹⁹² and passed the new constitution at February 7, 1831.¹⁹³ Though the Belgian National congress could decide in the constitutional question as *pouvoir constituant* sovereignly, he had to take numerous diplomatic questions into account when looking for a suitable candidate to the throne. The decision for Louis-Philippe's son failed on London's veto, whose support of the Belgian Independence depended on the ensuring of balance of power. Thus, Prince Leopold von Saxony-Coburg-Gotha, an uncle of the later Queen Victoria, who was related to the British royal house by marriage, prevailed as candidate, who had earlier rejected the Greek royal crown. The National Congress eventually elected him as 'King of the Belgians' and in July 1831 the Duke proceeded to Brussels as King Leopold I.

In the publication formula of Belgian laws, the monarchic title is still called 'King of the Belgians'. All powers are coming from the nation (Art. 25).¹⁹⁴ They are exercised as stipulated in the constitution (Art. 25).¹⁹⁵ The King has no other power but the one, which the constitution and other laws made in accordance with the constitution formally attribute to him (Art. 78).¹⁹⁶ The concurrency of popular sovereignty (Art. 25) and constitutional monarchy (Art. 78) was unique and owed to the chance of unconditional freedom of decision-making in the Constitutional Consultations of the national congress after the Belgian War of Independence against the United Kingdom of the Netherlands. Within the separation of powers, the legislative power was mutually assigned to the King and the two Chambers, the House of Representatives, and the Senate. The Senate was an elected regional representation of notables. Each of the three constitutional institutions had the right of legislative initiative (Art. 27 S. 1). The King had the executive power at his disposal according to the regulations of the constitution (Art. 29). The hierarchy of law and regulation, as established in the French July-Charte was taken over word by word in their constitution by the Belgian fathers of the constitution (Art. 67).¹⁹⁷ The Belgian constitution even went a step further in this question and devolved the control of non-legal ordinances and regulations to the Courts (Art. 107). The judiciary was exercised by

in 1840. Devaux largely shaped the movement for independence in the Belgian public with the journal *Politique* (Liège). At the assumption of office of the government of Lebeau-Rogier, he founded the liberally-oriented *Revue nationale* in 1840.

¹⁹¹ Only 46.000 of about 4 Mio. Belgians had the right to vote.

¹⁹² 108 of the 131 articles of the constitution were adopted literally – while the newly integrated provisions did not address the fundamental structure of the governmental structure leaving aside the mode of appointment of the senate and the relationship between church and state.

¹⁹³ Witte/Craeybeckx, *Belgique* (note 189), 9 seq.; about the importance of the French revolution at the discussions of the national congress: Marie-Rose Thielemans, *Image de la Révolution française dans les discussions pour l'adaptation de la constitution belge du 7 février 1831*, in: Michel Vovelle (Editor), *L'image de la Révolution française* 2, Paris 1990, 1015 seq.

¹⁹⁴ Cited in Willoweit/Seif (eds.), *Europäische Verfassungsgeschichte* (European Constitutional History, note 131), 513.

¹⁹⁵ Cited in Willoweit/Seif, (note 131), 513.

¹⁹⁶ Cited in Willoweit/Seif, (note 131), 522.

¹⁹⁷ Cited in Willoweit/Seif, (note 131), 520.

independent courts. A detailed catalogue of fundamental rights, reminiscent of the French role model of 1830 amended the equality of the Belgians before the law. The rights of the Belgians (Second Title of the Constitution) particularly entailed the freedom of assembly and of association (Art. 19, 20).

The monarch dismisses 'his ministers' just like in the France of the July monarchy (Art. 65). According to the French role model (Art. 12 of the 1830 Charte), the responsibility of the ministers is undefined in the text of the constitution (Art. 65 at the end). The ministerial responsibility by counter-signature (Art. 64) was normatively just regulated as judicial responsibility, which could lead to ministerial impeachment (Art. 90). Neither the ministerial responsibility nor the parliamentary exertion of influence on the formation of government were envisaged in the text of the Belgian constitution, but they have developed on this basis in the constitutional practice. Thus, the Belgian constitution of 1831 provides an example for the evolutionary force of constitutional practice. This is proved by the different phases of the stronger and weaker influence of the monarch on the formation of government. Even though the Belgian constitutional system is often termed parliamentary monarchy in the literature since its early days,¹⁹⁸ one must differentiate.

In the early years after the revolution, Leopold I held a comprehensive right of political participation also regarding the formation of government, so that the ministers needed 'double trust' in the sense of the French connotation of *parlementarisme à double confiance*. Furthermore, the King had great influence regarding the organisation of governmental policy. The Union of Liberals and Catholics having been formed in the opposition against the Dutch and still persisting in the new parliament even enhanced this situation by providing him with his own ample room due to loose party structures and thus a situation of uncertain majorities. Further, the members of parliament acknowledged the decision making power of the monarch because of the uncertainties in the field of foreign policy and his ability to secure Belgian Independence thanks to his personal contacts with England, Germany and France. Thus, the Belgian King projected national independence. Leopold made sure, that the ministers had a majority in the Chambers, but at the same time needed his trust. The new King naturally led the cabinet himself, and the governmental programme, which had to be realised, had to be discussed with him and possibly changed in his view. He had the "*cabinet du roi*" at his disposal for his personal policy planning, an own brain trust, independent of the parliament and not envisaged in the constitution.¹⁹⁹

¹⁹⁸ Ernst-Wolfgang Böckenförde, *Der Verfassungstyp der deutschen konstitutionellen Monarchie im 19. Jahrhundert* (The constitutional model of the German constitutional monarchies during the 19th century), in: Ernst-Wolfgang Böckenförde/Rainer Wahl (Editors), *Moderne deutsche Verfassungsgeschichte (1815-1918)*, Köln 1972, 148 seq.; Langewiesche, *Europa zwischen Restauration und Revolution 1815-1849* (Europe between restoration and revolution 1815-1849), 5th ed., Munich 2007, 41 seq.; Boris Mirkine-Guetzévitch, *1830 dans l'évolution constitutionnelle de l'Europe*, in: *Revue d'histoire moderne* 6 (1931), 248 seq.; Raymond Fusilier, *Les monarchies parlementaires: Études sur les systèmes de gouvernement* (Suède, Norvège, Danemark, Belgique, Pays-Bas, Luxembourg), Paris 1960, 360 seq.; Jean Stengers, *L'action du Roi en Belgique depuis 1831, Pouvoir et influence: Essai de typologie des modes d'action du Roi*, Paris 1992, 28 seq., 34 seq.; referring to the doctrine of double trust of the ministers which continued to exist after the time of unionism in a differentiating manner: von Beyme, *Die parlamentarischen Regierungssysteme in Europa* (The Parliamentary governmental systems of Europe), Munich 1973, 128; Kaltefleiter on the contrary just talks about a quasi-parliamentary system (*Die Funktionen des Staatsoberhauptes in der parlamentarischen Demokratie* (The functions of the head of state in the parliamentary democracy), Köln/Opladen 1970, 127 seq.).

¹⁹⁹ Kaltefleiter, *Funktionen* (note 198), 96 seq.; Fusilier, *monarchies parlementaires* (note 198), 438 seq., 459 seq.;

The government did not obtain a more independent position until the end of Unionism in 1846/57, since now the majority situation in the chamber permitted the formation of homogenous cabinets, borne by one political belief. But even in this time a great independent scope of action regarding foreign policy remained with the King. His son Leopold II, who succeeded him to the throne in 1865, led the cabinet in fundamental questions himself, and he managed to dismiss a cabinet, entrusted with parliamentary confidence, thrice, even though the parliamentary system was firmly structured, and to enforce his own beliefs thereby. In the year of 1871, the King tried at first to edge individual ministers out of the government, and when not being successful, dismissed the whole moderately-clerical cabinet of Anethan. A few years later he brought down the strictly clerical government of Malou, which had altered the radically liberal school law of 1876 after the narrow election victory of 1884. Even though the King sanctioned the auditing law, he achieved the resignation of the government, which was superseded by the moderately-clerical cabinet of Beernaert, so that the aspired moderation was finally achieved by the King. In the year of 1907 a whole government had to resign because of a conflict with the monarch, when the cabinet of Smet de Naeyer was not any longer able to prevail against the stubborn old monarch in the conflict on the drafting of the annexation treaty of Congo by the Belgian state.²⁰⁰ The revocations under Leopold II indicate that the dualistic character partially continued and was regarded as fundamental principle in the field of foreign policy and the military.

4.3. Parliamentarism in England

Under the impression of the French and Belgian revolutions, a storm of petitions burst forth in favour of the extension of the right to vote in England. In accordance with the English fondness for the historical legitimation of the Common Law, the revolutionary ideals of 1789 were disparaged to be “*without any taste for reality or for any image or representation of virtue*”²⁰¹. The Parliament of Westminster claimed the representation of the nation. However, it was not the population that was represented (*real representation*), but the spheres of interest of the high nobility (*virtual representation*), landowning aristocracy and bourgeois merchants of the autonomous *City of London*. Corruptive exertion of influence was a common occurrence. George III (reg. 1760-1820) based his government upon the representatives, who were loyal to the royal interests, the so-called *King's Friends*. On the other hand, the economic centres of the industrial revolution in Manchester, Birmingham, Sheffield with their explosively growing population were not represented.

As early as 1780, claims for a reform of Parliament arise, also due to the loss of reputation of the crown after the defeat in North America and the empowerment of the cabinet government of the younger Pitt (reg. 1783-1802; 1804-1806) due to the broad

Witte/Craeybeckx, *Belgique* (note 189), 24 seq., 44 seq.; Stengers, *L'action du Roi* (note 198), 47 seq.; idem, *Evolution historique de la royauté en Belgique: modèle ou imitation de l'évolution européenne*, in: Res publica 1991, 88 seq.; Serge Noirret, *Political Parties and the Political System in Belgium before Federalism, 1830-1980*, in: European History Quarterly (EHQ) 24 (1994), 87 seq.

²⁰⁰ Xavier Mabilie, *Histoire politique de la Belgique: Facteurs et acteurs de changement*, Bruxelles 1986, 184 seq., Pierre Wigny, *Droit constitutionnel: Principes et droit positif*, 2 volumes, Bruxelles 1952, 678 seq.; Stengers, *L'action du Roi* (note 198), 57 seq.

²⁰¹ Burke, *Reflections on the Revolution in France (1790)*; in: idem, Works V, London 1815, 29-438, 117.

Tory-majority in Parliament.²⁰² The labour movement, taking hold since the end of the 18th century, claimed to pursue these reform movements. By doing that, it meets the aligned interests of the ascending middle class. At the same time, the royal succession of George IV (r. 1820-1830) to Wilhelm IV (r. 1830-1837) opened the way for new elections, which brought a majority of liberal-minded Whigs into the House of Commons, who were ready for reforms. After several oppositions of the House of Lords in the years of 1831 and 1832, the *Representation of the People Act 1832*²⁰³ obtained the Lord's approval. This franchise reform, perceived as revolutionary by contemporaries, reorganised the constituencies and broadened the right to vote. Considering the high census, the moderate amplification did not amount to democratisation,²⁰⁴ all the more so as this was way beyond the highly aristocratic mindscape of the Whiggist reformers. However, the slight changes to the constituencies and the right to vote sufficed to aggravate manipulations of the electoral and parliamentary votes. Neither the electoral nor the parliamentary voting results were any longer foreseeable. The parliamentary majorities were thus withdrawn from the defaults of the Crown and its related high nobility.

Additionally, the successful enforcement of the reform proposal against Crown and House of Lords strengthened the political weight of the House of Commons substantially. The self-consciousness of the House of Commons grew at that, due to which it challenged the Crown's prerogative regarding the formation of government. Wilhelm IV fell out with the government of Melbourne over the question of the right religious policy of the Anglican church in Ireland, and dismissed the cabinet, which had the genuine support of the parliamentary majority, just because it had lost his trust. The successive government of Peel was, despite the dissolution of parliament and new elections, not able to obtain a stable majority in the Lower House. After several defeats in vote, Robert Peel resigned in 1835. The King now saw himself forced to appoint Melbourne again, even though he did not have his trust, but solely the trust of the parliament.

Thus, the principle of parliamentary responsibility of the government was established. This practical case was raised to be a constitutional principle by the Lower Chamber in 1841: the motion of no-confidence, which was called for by Peel as leader of the opposition against the minority cabinet of Melbourne, which had been installed by Queen Victoria, included the statement, that the resumption of an office without the necessary trust of the Lower Chamber is against the spirit of the constitution: "*That her Majesty's Ministers do not sufficiently possess the Confidence of the House of Commons, to enable them to carry through the House measures which they deem of essential importance to the public welfare: and that their continuance in office, under such circumstances, is at variance with the spirit of the Constitution.*"²⁰⁵

²⁰² The following long-term government of Pitt the younger (1783-1801; 1804-1806), which regained a safe parliamentary basis after the landslide victory of the Tories at the 1784 elections, was able to push back the royal influence while at the same time allowing the cabinet government to develop. The rise of the cabinet cannot only be explained by the failure of Gregory III's personal regiment, but in the beginning also because of the personal support from the king which Pitt enjoyed. In the following years, the necessary inner unity of England in the battle against revolutionary France and Napoleon played an important role in this respect.

²⁰³ 2 & 3 Will. IV, c. 45.

²⁰⁴ In relation to 14 million inhabitants, about 7 % of the adult male population was eligible to vote. Only the well-off middle classes profited from the reform while smaller craftsmen and naturally also wageworkers were still denied the right to vote.

²⁰⁵ Confidence in the Ministry-Sir Robert Peel's motion, that the Ministry have lost the confidence of the

Even though this motion of no-confidence passed only with the majority of one vote,²⁰⁶ Victoria felt compelled, after the dissolution of parliament and new elections, to entrust Robert Peel with the formation of a government, who did not have her trust, but rather only the trust of the Lower Chamber.²⁰⁷

Even though the Crown's national power to integrate reinvigorated as political factor of power in the quarrel of the parties on the grain tariff from 1846 on, the loss of the royal right of prerogative to form a certain government, was irreversible. When the second great electoral reform of 1867²⁰⁸ favoured a stronger structuring of the political organisations, and thus allowed for a stable majority situation in the *House of Commons*, the only remaining option for the crown was to appoint the head of the majority party of the Lower Chamber as Prime Minister.

4.4. New estates-based constitutions of the Middle German states

Despite the clinging to former monarchy-concentrated traditions, a new openness towards the people's representations can be spotted in the German constitutional wave after the July revolution and the Belgian struggle for independence. None of the new estates-based constitutions of the Middle German states 1831-1833 is being imposed,²⁰⁹ but they are rather all agreed upon between the Princes and the already existent or reappointed old estate-based assemblies. However, in contrast to Belgium, the constitutions in Saxony, Electoral Hesse, Brunswick, and Hanover were agreed upon with the King, and, more importantly, the new constitutions all emerged in states without modern representative constitutions.

The formulations of the new estate-based constitutions of the Electorate of Hesse (Kassel) of January 5, 1831, the Kingdom of Saxony of September 4, 1831, the Duchy of Saxony-Anhalt of April 29, 1831, the Principality of Hohenzollern-Sigmaringen of July 11, 1832, and the Kingdom of Hanover of September 26, 1833 still followed the pattern of sovereign guarantees of the South German role model in Baden, Bavaria, and Wuerttemberg. What the catalogues of civil rights wanted to guarantee was often not yet existent in the constitutional reality. Thus, the constitutional texts were interpreted as programme to adjust the feudal economic and social order, often organised in guilds, to the constitutional claims for freedom.²¹⁰

The term 'sovereignty' is reinstalled (Hannoversches Grundgesetz (fundamental law of

House of Commons-Debate, in: Hansards Parliamentary Debates, third series (commencing with the Accession of William IV 4^o Victoriae, 1841), vol. 58, London 1841, 802. See also http://www.hansard-archive.parliament.uk/Parliamentary_Debates_1830_to_1891.

²⁰⁶ 312 yes and 311 no-votes.

²⁰⁷ Roland Kleinhenz, *Königtum und parlamentarische Vertrauensfrage in England 1689-1841* (Kingdom and the parliamentary vote of confidence), Berlin 1991, 19 seq., 79 seq., 90 seq., 148 seq.; Gary W. Cox, *The Development of Collective Responsibility in the United Kingdom*, in: *Parliamentary History* 13 (1994), 32 seq., 46 seq.

²⁰⁸ Increase of the number of those eligible to vote from about 9 % to about 16 % of the adult population.

²⁰⁹ Constitution of the Electorate of Hesse (Kassel) from January 5, 1831; the Constitution for the Kingdom of Saxony of September 4, 1831 The constitutional document of the Principality of Hohenzollern-Sigmaringen of July 11, 1832.

²¹⁰ Additionally, the early constitutional guarantees in the constitutional pre-march situation become „*Richtungsbegriffe für die Prozesse der Rechtsänderung und Gesellschaftsgestaltung*“ („Decisive terms for the processes of changing the law and designing society“) (Müßig, *Recht und Justizhoheit* (law and prerogative), 2nd ed., Berlin 2009, p. 34 et seq.

Hanover), Chapter 2, §§ 7, 8). The princely sovereignty seems to be instrumentalised against the willingness to intervene of the *Bund*, which intensifies after 1832. The dualism between the Prince as bearer of all state authority, and the bicameral people's representation, one with appointed and hereditary members, and a second with elected deputies, is modified by giving a right to legislative initiative not only to the government, but also to the two chambers (Hannoversches Grundgesetz (fundamental law of Hanover), § 88). The autonomous right to assemble is often denied. A parliamentary influence on the formation of government was not provided. Expression of the ministerial responsibility was the counter-signature, by which legal responsibility for the lawfulness of royal decrees was taken over (Hannoversches Grundgesetz (fundamental law of Hanover), Chapter 8, § 151).

4.5. South German Constitutional Practice

The revolutions of 1830 in France and Belgium did not only trigger a new constitutional wave in the North and Middle German states. Their liberal spirit of optimism also caught the chambers in the South German constitutional states. In Baden and in Bavaria, bourgeois-liberal oppositions became stronger in the chambers. In addition to that, the lavish practice of censorship of the South German press paved the way for liberal agitation.²¹¹ Radical writings, published by German emigrants came into the country from Switzerland and Alsace²¹². The pointed pen against the restorative powers in the coverage reflected the beginning of general politicisation of society. The public opinion, suppressed since the Carlsbad Decrees, revolved as determining political factor.

4.5.1. Grand Duchy of Baden

The royal succession coincided with the elections of the *Landtag* in the revolutionary year of 1830 in the Grand Duchy of Baden.²¹³ The appointment of the liberal state councillor Ludwig Georg Winter²¹⁴ as Home Secretary was a beacon, which found its expression in the elected liberal majority of the chamber. The mandates of the publishers of the state encyclopaedia Rotteck²¹⁵ and Welcker are exemplary for the mental reform

²¹¹ Compare for instance the mild handling of censorship after the Bavarian edict of the press of 1818. The rule was, that the authorities only considered those articles to be 'political' which concerned the relation of Bavaria to other states. Articles dealing with interior state-related circumstances were left unobjected by the censoring authorities. On the basis of this relative freedom of the press, numerous oppositional newspapers had developed in Bavaria, for instance the moderate-liberal *Allgemeine Zeitung* by Cotta in Augsburg and furthermore radical ones mainly in the Rhenish Palatinate.

²¹² For instance the „Freisinnige“ in Fribourg published by *Rotteck* and *Welcker*, the „Schwarzwälder“ for the Oberland, the „Wächter am Rhein“ in Mannheim. Aside from Rheinpfalz, Baden became the country of uninhibited liberal and democratic agitation.

²¹³ The Grand Duke Ludwig died in March 1830. His successor was Grand Duke Leopold (1830-52), the first ruler out of the Hochberg line of the dynasty.

²¹⁴ As a convinced devotee of a constitutional monarchy, Winter assured that – contrary to the elections in 1820 – these elections were held without any kind of interference by the authorities.

²¹⁵ At first, he had been sitting in the First Chamber as representative of the University of Fribourg; after the royal succession, he was part of the newly elected Second Chamber which constituted itself in March 1831. Karl Theodor Welcker became member of the Second Chamber together with him.

power of this spirit of optimism. The thus fostered willingness to cooperate of the government of von Reitzenstein enabled the revocation of the reactionary constitutional amendments of 1825.²¹⁶ The appreciation of communal autonomy and the enhancement of the communal suffrage in March 1831 resembled the liberal French 'loi municipale' of 1831. Even though the threat of the Chamber, not to adopt the budget, was necessary for the enforcement of the Baden Preßgesetz (press law) of December 28, 1831²¹⁷, its liberal diction, to repeal censorship for the discussion of questions regarding Baden, purported, that Baden on this side of the Rhine embarked on the same path as France on the other side of the *Reich*.

The forced revocation by the *Bund* through the Grand Duke by way of decree²¹⁸ however showed the confines of the shifts of power between crown and parliament in the states of the German Confederation, which was dominated by the non-constitutional states of Austria and Prussia. It was not before that the opposition could decide the elections again in its favour in 1846, a shift in the constitutional system towards the parliament loomed. The conservative head of government Blittersdorf resigned, and the liberal-moderate Head of the Chamber Johann Baptist Bekk took over the key department of the interior. Thus, Leopold did not form a government, which only consisted of members of the Chamber's majority, but he took the liberal majority of the chamber into account as he formed the government.²¹⁹

4.5.2. The Kingdom of Bavaria

In Bavaria, liberal forces were boosted through the revolutionary summer of 1830, after the spectre of the French restoration policy under Charles X had fanned the fears of a catholic conservatism, which had been triggered by the ministerial changes in the Interior Ministry 1828. The new elections of the *Landtag* in December 1830 brought the liberals a lot of success. Thus encouraged, they commenced on the reduction of the civil list, and tried to curb the royal building rage in Munich, for instance of the Pinakothek, which had been started back then. Thus, the resulting tensions between the government and parliament gave an edge to the student uprisings at Christmas Eve 1830, when the concerned King let himself be carried away to the point of unlawfully arresting people and closing the University of Munich. The *Preßverordnung* (press decree), enacted as

²¹⁶ Badisches Gesetz (Law of Baden) of June 8, 1831 (Regierungsblatt 1831, 79).

²¹⁷ Regierungsblatt 1832, 29.

²¹⁸ Of July 28, 1832, published in Regierungsblatt Baden 1832 No. 42. The first decree declared the law of the press of Baden *ipso jure* invalid due to its violation of federal law, and reintroduced censorship according to the federal law of the press while the second decree contained the order of execution. Thus, it was clear that the phrase „Bundesrecht bricht Landesrecht“ („federal law takes precedence over state law“) not only imposed duties on the responsible state to repeal a state law in contravention of federal law, but that the nullity was automatically caused by the violation. It is only due to this nullity that the Grand-Duke was able to contend the invalidity of the state press law in contravention of federal law by means of decree. If the annulment of the law had been necessary, the Grand-Duke would have needed the participation of the *Landtag*.

²¹⁹ Nipperdey, *Deutsche Geschichte 1800-1866* (German History 1866-1918), vol. 2: Machtstaat vor der Demokratie (The powerful state before the democracy), 2nd edition, Munich 1993, 350 seq.; Hardtwig, *Vormärz: Der monarchische Staat und das Bürgertum* (The Pre-March Era: The monarchical state and the bourgeoisie), Munich 1993, 62 seq.

implementation law to § 2 of the *Preßedikt* (press edict) of 1818²²⁰, drastically aggravated the censorship of printed materials.²²¹ When the new *Landtag* met at February 20, 1831, the threat with the impeachment of Schenk²²² already sufficed to induce the monarch to comply: on March 26, 1831, he dismissed the Home Secretary and on June 13, 1831, he repealed the *Preßverordnung* (press decree) of Schenk²²³. The shift of power in favour of the parliament has its reason in the fact that the parliamentary pressure did not only bring the crown to dismiss the minister, but also to abandon the controversial governmental measure under the parliamentary pressure.

The Chamber also gained ground towards the crown in the controversy on the leave of absence of representatives, who were at the same time civil servants. In the election of December 1830, no less than 54 civil servants made it into the Second Chamber. The government under Schenk still refused the leave of those civil servants,²²⁴ which seemed unpopular due to their liberal attitude. By enforcing the membership in the chamber of civil servants, who were not granted leave, the Chamber successfully claimed its right of independent scrutiny.²²⁵ However, no agreement was reached regarding the controversy of the leaves of absence. In fact, the government insisted in its right to render the entry of oppositional representatives impossible by denying their leave of absence. This abuse of the right to leave *de facto* made mandate and office incompatible for oppositional civil servants.

Despite the mentioned partial successes of the chamber, there is no permanent influence of the liberal majority on monarchically run governmental politics, particularly since the narrow-mindedness of Ludwig I in his 'lolamont' years eliminated all willingness to compromise.²²⁶

²²⁰ *Preßverordnung* (Decree on the press) of January 28, 1831 (Regierungsblatt 1831, 33).

²²¹ The *Preßverordnung* (*Decree on the press*) by Schenk of 1831 ended the lax censorship practice of the Edict on the press of 1818. The preliminary censorship is extended to *all* articles with political content without any exception, no matter if they referred to interior or foreign policy. Although the decree tried to restrict the censorship to violations of a specific kind ('notorious falsehood', 'invented news', 'obvious misrepresentation', 'improper and insulting expressions', 'a blame resulting in blasphemy'). But these flexible clauses left endless possibilities for the censorship authorities.

²²² The threatening with a ministerial impeachment often proved an effective leverage since the King often considered it more appropriate to sacrifice the minister under attack by choice than exposing him to a trial.

²²³ Decree of June 13, 1831 (Regierungsblatt 1831, 337).

²²⁴ Among them also civil servants of whom it was doubtful if they needed the leave of absence from the parliamentary mandate at all. The city councils of Nuremberg, Bamberg and Kempten strongly petitioned against this abuse of state power. A chamber terrorized by such governmental methods was named by the opposition as mere pseudo-representation.

²²⁵ Compare the example of the representative Karl Baron von Closen (1786-1856), who gave up his office to exercise his mandate. He was part of the Bavarian civil service since 1805 and belonged to the second chamber since 1819. He was a member of the Frankfurt National Assembly in 1848.

²²⁶ After these experiences, Ludwig I decided to resist more strongly against the liberal policies which the estates tried to impose on him. In December 1831, he ordered the *Landtag* to be ended. He formed a new government on December 31, 1831, which was headed by the conservative Field Marshall Prince Wrede. The moderate-conservative Baron von Gise became foreign minister. Driving force of the new cabinet was the minister of interior affairs *Prince von Oettingen-Wallerstein* (1791-1870), an enlightened man of the world, who was to make a successful effort in the years to come to balance the increasingly catholic-conservative mood of the court and the moderate liberalism of the mainstream public opinion.

4.5.3. Kingdom of Wuerttemberg

The impressions of the July revolution were at first not able to harm the stability of the monarchical system of Wuerttemberg. Taking advantage of the three-year-limit in § 127 of the Constitution of Wuerttemberg of 1819, the elected *Landtag* of 1831 was not convoked by the monarch up until 1833. A parliamentary right to assemble autonomously was not provided for in the constitution of 1819. When the *Landtag* finally met in 1833, the start of work of the parliament was overshadowed by the majoritarian resilience in questions of scrutiny. The resistance of the representatives against the decisions of the *Bund* of 1832, which were limiting freedom, moved King Wilhelm I to dissolve the 'futile *Landtag*' after just two months. The liberals under the lead of Friedrich Römer won the new election in March 1833 again. The denial of leave of absence for oppositional representatives, who were at the same time civil servants, challenged Friedrich Römer, Ludwig Uhland, and other liberal representatives to quit civil service.

The parliamentary opposition was not granted success towards the government, which successfully kept the representatives together.²²⁷ The opposition did neither manage to hinder the annexation of Wuerttemberg to the *Deutsche Zollverein* (German Customs Union) nor overturn the decree of the *Bund* of 1834 on the installation of the *Bundesschiedsgericht* (Federal Arbitration Court). The liberal leaders Uhland, Pfitzer and Römer resignedly waived another candidature for the *Landtag*, in which a strong governmental majority ruled in 1838.

5. Outlook: European Constitutional History as a History of Movements

Even though chances emerged again and again for an influence of the chambers on the monarchically run government in the South German constitutional practice, the repressive frame of national politics prevented a real boost of parliamentarisation. In addition to that, an accentuation of parliamentary participation rights through a connection of the constitutional movement with nationalism lacked, as it can be seen in other European countries after 1830. Through the connection with nationalism, the constitutional movements showed a comprehensive European dimension despite their respective national orientation. This is not only true for Belgium, and not only for realized constitutional projects, but rather especially also for the Paulskirchenverfassung (constitution of the Paulskirche) and Charte Waldeck. Even though the Revolution of Warsaw failed because of the abdication of the Czar 1830 as King of Poland and because of the formation of a national government under Adam Jerzy Prince Czartoryski, the Polish rebels were celebrated in the German or French exile as freedom fighters. In the course of the Italian *Risorgimento*, a bourgeois-liberal opposition against the prevalence of Spanish Bourbons in South Italy and of the Austrian Habsburgs in Upper Italy emerges. The spokesmen Giuseppe Mazzini and Giuseppe Garibaldi claimed national unity in the same breath with constitutions and parliaments. The people and its representation are once more stronger articulated by the connection of the constitutional movement with nationalism in Spain (1837), Greece (1844), and Italy (1848). The adoption of constitutions without a prior participation of constitutional assemblies became exceptional. The Spanish Constitution of 1837 is prepared by the *Cortes* as constituent

²²⁷ Umbach, *Parlamentsauflösung in Deutschland: Verfassungsgeschichte und Verfassungsprozess* (Dissolution of parliament in Germany: Constitutional history and constitutional process), Berlin 1989, 40 seq.

assembly and agreed upon with the monarch.²²⁸ The Greek Constitution of 1844 reclaims the divine assistance of the ‘holy and indivisible trinity’ for the monarch and the Hellenistic people. Just the *Statuto Albertino* of 1848 calls upon the divine right of Carlo Alberto and his royal plenitude of power.²²⁹

In regard to the state organisation-structure between monarch and parliament neither the Paulskirchenverfassung (constitution of the Paulskirche) nor the imposed Prussian constitution turned away from the provisions of the French Charte. Both in the Frankfurt and in the Berlin consultations, the Belgian constitution was present as a role model. Despite Friedrich Julius Stahl’s work *Das monarchische Prinzip* (The Monarchical Principle)²³⁰ in 1845 having introduced into scholarship the ideologisation of a western kind of constitution that always remains constitutional in itself, in 1848 and 1850, the relationship between the monarch and popular sovereignty was open as well.²³¹ Self-explanatory evidence of a constitutional understanding marked by the willingness to compromise is Heinrich von Gagern’s opening of the Frankfurt National Assembly by reference to the ‘sovereignty of the nation’.²³² This avowal to the singular and unlimited *pouvoir constituant* of the Assembly implies a national claim to self-government without at the same time entering into a conflict with the monarchy by avowing popular sovereignty. The openness of the Paulskirchenverfassung (constitution of the Paulskirche) in respect to the question of political-parliamentary accountability of the *Reich* government corresponds to this consensus-oriented thinking irrespective of the detailed regulation of the relationship between the government and parliament (right of convocation and dissolution, veto of the Emperor in the legislative procedure, competence of regulating

²²⁸ Compare the wording of the preamble in the *Constitucion de la Monarquia española de 1837* (Gazeta de Madrid, de 24 de junio de 1837; *Textos constitucionales españolas 1808-1978*, ed. Javier Hervada/Jose M. Zumaquero, Pamplona 1980, 139, transl. paraphr): *Thou shalt know that the general Cortes hath decreed and sanctioned as follows and we in accordance have accepted the same: Since it is the will of the nation, for the good of the sovereignty, to peruse the constitution promulgated in Cadiz on March 19, 1812, the Cortes for this purpose decree and sanction the following constitution of the Spanish monarchy.*

²²⁹ For reference compare Gosewinkel/Masing, note 187, 1044, 1375. The preamble concedes (transl. paraphr) „after the obtaining of the opinion of our council” (ibid., 1375). Martin Kirsch, *Monarch und Parlament* (Monarch and Parliament), Göttingen 1998, 129) assumes, that the constitutional imposition is modified by the capacity of the chamber since 1852.

²³⁰ *Das monarchische Prinzip, eine staatsrechtlich-politische Abhandlung* (The monarchical principle, a constitutional-political dissertation), Heidelberg 1845, repr. Berlin 1926, 5.

²³¹ This pithy comparison of parliamentarism and constitutionalism does begin before the mid-19th century, however, it is only after the foundation of the *Reich* that it asserts itself: Johann Caspar Bluntschli in *Allgemeines Staatsrecht* (General Constitutional Law) (vol. 1, 3rd edition, Munich 1863, chap. 21) calls the constitutional monarchy a west Europeantype of constitution. Paul Laband’s *Staatsrecht des Kaiserreichs* then intensifies the polarisation between constitutional and parliamentary constitutions (vol. 2, 2nd edition, Leipzig 1913, chap. 6, § 54). In 1911, the historian Otto Hintze hails the constitutional monarchy „das eigenartige preussisch-deutsche System“ („the curious Prussian-German system“) (Hintze, *Das monarchische Prinzip und die konstitutionelle Verfassung* (The monarchical principle and the constitutional constitution), in: idem/Gerhard Oestreich, *Staat und Verfassung: Gesammelte Abhandlungen zur allgemeinen Verfassungsgeschichte* (State and constitution: Complete dissertations about the general constitutional history), 2nd edition, Göttingen 1962, 359).

²³² Franz Wigard (Editor), *Stenographischer Bericht über die Verhandlungen der deutschen constituirenden Nationalversammlung zu Frankfurt am Main* (Stenographic Report of the deliberations of the German national constitutional assembly in Frankfurt on the Main), vol. 1 (Nr. 1-33), Frankfurt on the Main 1848, 17.

the order of business).²³³ Having in mind the fundamental politicisation due to the March Revolution, both the deliberations about ministerial accountability in June 1848²³⁴ as well as the ‘improvised parliamentarism’²³⁵ in the National Assembly are indicators for the potential for development of a post-revolutionary parliamentary government practise on the basis of the Reichsverfassung,²³⁶ all the more so since the binding of the government to the parliamentary majority was advantaged due to the personal compatibility of a parliamentary mandate and an office of minister (§ 123).²³⁷

In Prussia the signs are not set for conflict either. Both the deliberations of the Prussian National Assembly as well as the revised Prussian Constitution of 1850 assume a basic readiness for compromise between the monarchical government and parliament. In the government proposal for a Constitution which was brought before the National Assembly at its first meeting on May 22, 1848, having the role model of the Belgian Constitution in mind, two elected chambers were envisaged. Following the French Pairs

²³³ The imperial right to convene and postpone the Reichstag (§§ 79, 104, 106, 109) is precisely fixed. It is only the Volkshaus (§§ 79, 106) that could be dissolved. The Emperor’s veto concerning ordinary laws (§ 101 Abs. 2) and those altering the constitution (§ 196 Abs. 3) was only suspensive in nature and could be overcome by the Reichstag. Interior matters (Executive Committee, Membership, Standing Orders) could be regulated by the first and second chamber without any need for participation of the executive (§§ 110-116).

²³⁴ The deliberations about ministerial responsibility in June 1848 revealed a consensus between left, conservative and constitutional liberals about a political ministerial responsibility, even though the constitutional text only fixed one of law. Therefore, according to the Casino-representative Friedrich a responsible ministry could *„ohne Majorität der Nationalversammlung nicht Einen Tag fortregieren“* (not continue governing for a single day without a majority in the national assembly) (Wigard (Editor), Stenographischer Bericht (note 232), vol. 1, 370 seq.). Parliamentary responsibility was not thought of as problem to be fixed precisely by law but rather a question of political decorum. For instance, in the justification of the bill *„die Verantwortlichkeit der Reichsminister betreffend“* (concerning the responsibility of the ministers of the Reich) (August 18, 1848), the expectation was expressed that the minister *„gegen den ein Mißtrauensvotum ausgesprochen ist, oder dessen Benehmen Gegenstand ununterbrochener Aussprüche des Tadels von Seiten der Kammern ist, als Mann von Ehre sich zurückziehen wird“* (against whom a vote of no confidence succeeded or whose behaviour is the topic of consistent criticism of the Chamber will resign as a man of honour) (Konrad Dieterich Hassler (Editor), Verhandlungen der deutschen verfassungsgebenden Reichsversammlung zu Frankfurt a. Main (Deliberations of the German constitutional assembly of the Reich in Frankfurt on the Main), vol. 2: Berichte (Reports), Frankfurt on the Main 1848, repr. Vaduz 1984, 145).

²³⁵ As long as parliament was functioning, the composition of the Ministry of the Reich was changed according to the altering majorities. The imposition of a minority cabinet in June 1849 caused protest.

²³⁶ Huber, Böckenförde, however, as well as Kühne, conceive a specific German type of constitutionalism in the draft of the Paulskirchen assembly which rendered parliamentary government politics impossible due to its dualism of monarchy and popular representation (Huber, *Deutsche Verfassungsgeschichte seit 1789*, 2nd edition, vol. 3, Stuttgart 1978, 3 seq.); idem, *Das Kaiserreich als Epoche verfassungsstaatlicher Entwicklung* (The Empire as an era of constitutional development), in: Josef Isensee/Paul Kirchhof (Editors), *Handbuch des Staatsrechts* (Handbook of constitutional law), vol. 1, 3rd edition, Heidelberg 2003, § 4, marginal number 52 seq.; Böckenförde, *Der Verfassungstyp der deutschen konstitutionellen Monarchie im 19. Jahrhundert* (The German type of constitutional monarchy), in: ibid./Rainer Wahl (Eds.), *Moderne deutsche Verfassungsgeschichte (1815-1918)*, Köln 1972, 70 seq.; Kühne, *Die Reichsverfassung der Paulskirche: Vorbild und Verwirklichung im späteren deutschen Rechtsleben* (The Paulskirchen Constitution, role model and realisation in the German legal life to come), 2nd edition, Neuwied 1998). Concerning the present state of research compare Fehrenbach, *Verfassungsstaat und Nationsbildung 1815-1871* (Constitutional State and nation building 1815-1871), Munich 1992, 71-75 and 75-85.

²³⁷ Such a combination was excluded by the Reichsverfassung 1871 from the very beginning.

Chamber, the monarch could also invoke life members to the First Chamber.²³⁸ In the counter proposal from the constitutional commission headed by the Chairman of Franz Waldeck (1802-1870)²³⁹ which is oriented towards the Franco-Belgian model,²⁴⁰ the so called *Charte Waldeck*, the position of Parliament in respect to the monarchical government was strengthened normatively: alongside the general franchise for the Second Chamber, the Crown had merely a suspensive veto.²⁴¹

Combined with the planned introduction of a popular army, this went too far for the Prussian king and thus unrest in October was a welcome occasion to dissolve the National Assembly and impose a monarchical constitution. This imposition of December 5, 1848 accommodated constitutional-liberal demands. The provisions concerning basic rights and the judiciary are taken from the *Charte Waldeck*.²⁴² With the introduction of the absolute veto (Art. 64) and the Emergency Directive Right for the Monarch (Art. 63),²⁴³ the Prussian Constitution, even in the revised framing of the basic structure between monarch and parliament of 1850 does not fall short of the provisions of the 1830 *Charte*. Despite disagreement in the conservative senior staff of Friedrich Wilhelm IV, as to whether one should emulate the Austrian neo-absolutism or implement conservative policies with the help of constitutionalism, Prussian constitutional politics remained a

²³⁸ Both, as far as the systematic structure as well as the lack of incorporating the principle of national sovereignty is concerned, the Prussian governmental draft differed from the Belgian model and was thereby more similar to the French *Charte* of 1830.

²³⁹ During the Prussian constitutional conflict, the jurist Waldeck was member of the Prussian House of Representatives for the *Fortschrittspartei* (Progress Party) (1861-69).

²⁴⁰ Cf. a.o. Susanne Böhr, *Die Verfassungsarbeit der preußischen Nationalversammlung 1848* (The Constitutional drafting of the Prussian National Assembly), Frankfurt on the Main 1992, 29 seq.; Schubert (Ed.), *Verhandlungen der Versammlung zur Vereinbarung der preußischen Staats-Verfassung* (Negotiations of the Assembly concerning the agreement on the Prussian state constitution), Berlin 1848/49, repr. Vaduz 1986; K. G. Rauer (Ed.), *Protokolle der von der Versammlung zur Vereinbarung der Preußischen Verfassung ernannt gewesenen Verfassungs-Kommission* (Protocols of the appointed constitutional commission on the agreement of the Prussian constitution), Berlin 1849, 45 seq., 77, 79 seq., 126 seq.

²⁴¹ A modification of Reichenspergers' original proposal concerning an absolute veto was only made by 13:11 votes.

²⁴² An upheaval as in Vienna did not take place. The amending deliberations concerning the Pillersdorf Constitution of April 25, 1848 were overwhelmed by the October Revolution. The constitutional draft made by Kajetan Mayer is being favoured by the Kremsier constitutional committee and contains an enumeration of rights oriented on the French and Belgian ones as well as a clear separation of powers between executive and legislature. Although ministers are to be named by the Kaiser, they may not be part of the royal family and are completely responsible to Parliament (§ 66, 68). Also, both chambers of the Reichstag are strictly separated (§ 80); furthermore, members of the Reichstag wishing to fulfill higher public positions or advancing otherwise within public administration have to stand election again (§ 78). Moreover, the judicature is no longer to be exercised by the Emperor but by judges appointed for life (§ 135), who may not be part of the government (§ 136), are irreplaceable (§ 39), and thereby absolutely independent from the administration (§ 137). Contrary to the Pillersdorf Constitution, it should only be valid in Austria without Hungary and Lombardo-Venetia (§ 1). These Kremsier Deliberations have a hard to underestimate influence on the imposed *Märzverfassung* (Andreas Gottsmann, *Der Reichstag von Kremsier und die Regierung Schwarzenberg: Die Verfassungsdiskussion des Jahres 1848 im Spannungsfeld zwischen Reaktion und nationaler Frage* (The Reichstag of Kremsier and the Schwarzenberg government: The constitutional discussion of the year of 1848 between reaction and the national issue), Vienna 1995, 117 seq.).

²⁴³ Huber (Editor), *Dokumente zur Deutschen Verfassungsgeschichte* (Documents on German constitutional history), vol. 1: Deutsche Verfassungsdokumente 1803-1850 (German constitutional documents 1803-1850), 3rd edition, Stuttgart 1978, 507 (concerning both provisions).

compromise between Crown and middle-class constitutional movements.²⁴⁴

Even though in the escalation of the Prussian constitutional conflict between crown and parliament, the basic agreement between the crown and parliament was abandoned, and with that the idea of the monarch as a non-accountable bearer of the unified governmental power gaining hold,²⁴⁵ the Prussian constitution offered various possibilities for development. The cooperation of the Chambers with monarchical government was not marked by constant confrontation blocking the legislative work of both constitutional powers. Even in the time of constitutional conflict, by no means all legislative proposals failed in the Prussian House of Representatives.²⁴⁶ Even the laming of the parliament operations through obstruction or the circumvention of the chambers with the help of the royal right of directive did not take place.²⁴⁷

With that this article may come to an end. The reception of the European constitutional debates within European liberalism does not lead to fixed ideas or static constitutional structures. It is precisely the openness, maybe even indecisiveness of constitutionalism in the relationship between monarch and parliament, which shows that constitutional history has nothing to do with static contexts of order of the foundation and limitation of power, but rather that with the balance of power of the constitutional variables it is in constant movement and change.²⁴⁸ Constitutional history is the 'history of movements'.²⁴⁹ This idea was at the same time the guideline of this study about European constitutional debates of the 18th century. And therefore, it could not end with a caesura in 1789. It is only with the perspective on European constitutionalism that the legal perceptions developed in the European constitutional discussion could be incorporated into constitutional terminology accordingly to the research approach articulated in this study.

²⁴⁴ Barclay, *Anarchie und guter Wille: Friedrich Wilhelm IV. und die preussische Monarchie* (Anarchy and a good will: Friedrich Wilhelm IV. and the Prussian Monarchy), Berlin 1995, 285 seq., 308 seq.

²⁴⁵ Huber, *Verfassungsgeschichte*, note 236, 3 seq.; idem, *Kaiserreich*, note 236 (chap. 7, n. 14), § 4 marginal number 52 seq.; Böckenförde, *Monarchie*, note 236, 70 seq.; Kühne, note 236.

²⁴⁶ Even when being supported by a conservative parliamentary majority the government could not be assured not to have to face a defeat in particular questions. An example is the proposal concerning taxes which failed in the Prussian House of Representatives and Upper Chamber in 1857.

²⁴⁷ Grawert, *Gesetzgebung im Wirkungszusammenhang konstitutioneller Regierung* (Legislation in connection with constitutional government), in: *Gesetzgebung als Faktor der Staatsentwicklung* (Legislation as factor of state development), *Der Staat*, supplement 7, Berlin 1984, 122 seq., 157 seq.;

²⁴⁸ Hofmann, *Verfassungsgeschichte als Phänomenologie des Rechts*, München 2007, *Sitzungsberichte der Philosophisch-historischen Klasse der Bayerischen Akademie der Wissenschaften* 3, 1 seq., 4.

²⁴⁹ Wahl, *Der Konstitutionalismus als Bewegungsgeschichte*, in: Müßig (Ed.), *Konstitutionalismus und Verfassungskonflikt* (Constitutionalism and Constitutional conflict), Tübingen 2006, 197 seq.